United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

CA 75-7519

IN THE

United States Court of Appeals

For the Second Circuit

No. CA 75-7519

THE FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff

against

SIDNEY PEPPER,

Appellant-Cross Appellee,

ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr.; ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS,

Appellees.

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus,

Appellee-Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Vol. I)

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UNITED STATES COURT OF APPEALS
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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DOCKET ENTRIES

STATES DISTRICT COURT

Jury demand date: 12-16-68 by defts.

JUDGE FRANKEL

JUDGE DUFFY

2a

.06 Rev.

TITLE OF CASE	ATTORNEYS
RST NATIONAL BANK OF CINCINNATI VS. PEPPER, ETAL. PRECEDING PAGE FOR ENTIRE TITLE)	For plaintiff: 6/18
	For defendant: Casey, Lane & Mittendorff (for Cox, Broglie, Del Coro, Bogaards, Jr. Hough, Schlereth, Arlinghaus and Arlinghaus) 26 Broadway 10004 WH 3-3000 ~~Dugan & Rosen~~ ~~(for Sidney Pepper)~~ ~~25 W. 43 St., NYC 10036 (564-6320)~~ ~~HARPER & MATTHEWS (Sidney Pepper) 512-71)~~ ~~60 WALL, ST. N.Y. 10005~~ Brauner, Baron, Rosenzweig and Klinger, 120 Broadway, New York, N.Y. 10005 732-5535 (attys. of record for: Sidney Pepper.)
d cause on transfer from So. . of Ohio, ~~fees~~ fees paid (68-6802) 000 still in registry pending motion	

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.		DISB.	
ailed X	Clerk		2/25/71	Casey Lane,	5	—		
			2/26/71	U.S. Treas			5	—
ailed	Marshal		4/5/71	Casey Lane	5	—		
			4/12/71	U.S. Treas			5	—
Action:	Docket fee							
eader action 000	Witness fees							
arose at:	Depositions							

- vs -

SIDNEY PEPPER, et al

3a

	PROCEEDINGS	Date Order Judgment No.
/68	1 COMPLAINT, filed by Pltf.	
/68	K MOT. FOR RESTRAINING ORDER, filed by Pltf.	
	B RESTRAINING ORDER, entered by J. Porter.	
'68	Summons & Restraining Order issued USM for service on all Defts.	
9/68	4 USM Return of Summons, filed - Executed on HH EBERLE on 7/15/68; on S. Pep on 7/8/68;on Mod. Talking Picture Serv. on 7/11/68;on E.W. Cox on 7/12/68; USM FEES $32.16	
0/68	4 USM Return of Summons, filed - Executed on H.W. Boggards on 7/22/68 USM FEES $14.00	
68	5 Entry Extending time to Plead, entered by J. Hogan - Deft. S. PEPPER has till 10/1/68 to plead, move Ans. etc.	
/68	4 USM Return of Summons, filed - Executed on R.M. HOUGH on 7/10/68, R.A. Broglie on 7/15/68, R.J. De[illegible]o on 7/17/68,R.M. Arlinghaus as custodian of F.R. Arlinghaus on 7/12/68, same for J.C. same on 7/12/68, same for A,A. same on 7/12/68, same Executrix Estate of F.H. same on 7/12/68, same on 7/12/68, A.A. same on 7/12/68, A.M. Schlereth on 7/12/68 - USM fees $69.52	
/68	4 USM Return of Summons, filed - Executed on A.M. Walcott on 7/8/68 USM fees $8.40	
/68	6 Entry extending Time to plead, entered by J. Porter - W. H. MacCallum & A. M. Walcott has till 10/1/68 to plead.	
/68	7 ANSWER, filed by Deft. S. PEPPER, by leave of Court.	
/68	4 USM Return of Summons filed - Executed on W.H. MacCallum on 8/1/68 USM fees $11.12	
68	8 Deft, Rosalie M. Arlinghaus Motion to transfer cause filed. Set for Nov 4, 1968 @ 1:30 PM.	
68	9 Answer of deft, Rosalie M. Arlinghaus filed.	
68	10 Deft Arlinghaus's memo in support of her mot. to transfer the action to the S. Dist. of New York filed.	
68	11 Entry by J. Porter extending time to Oct 7, 1958 for defts, Wm.H. MacCall and Alexandra MacCallum Walcott to plead.	
-68	12 Answer of Wm. H. MacCallum & Alexandra MacCallum Walcott to Complaint in Interpleader filed.	
/68	13 Cert. of Service filed by counsel James J. Ryan	
/68	14 Appearance of Harry M. Hoffheimer as counsel for WM. H. MacCALLUM & ALEXANDRA MacCALLUM WALCOTT, filed	
/68	15 Afft. in Opp. to Mot. to Transfe , filed by Deft. S. PEPPER.	
68	16 Afft. in Support of Mot. to Transfer, filed by Deft. R.A. Arlinghaus	
68	17 Reply Memo on behalf of deft, Rosalie M. Arlinghaus filed with certificate of service.	
68	Called on DSP Mot. Docket - Counsel argued - Mot. Granted - Entry to come.	
-68	18 Pltf's Mot. for Discharge, Costs & Attorneys' fees filed. Set for December 2, 1968 at 1:30 p.m.	
/68	19 ORDER GRANTING MOT. FOR CHANGE OF VENUE, etc., entered by J. Porter-issued counsel	
/68	Record & Original JS 6 Card together w/copy of Docket Card mailed to Clerk of U.S. District Court for Southern District of New York, New York City.	

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	PROCEEDINGS	Date Order or Judgment Note
0-68	Filed papers originally filed in Southern Dist. of Ohio were this day filed, except Pltff's. motion filed 11/13/68 and order transferring.	
	RECORD OF PROCEEDINGS SDNY	
2-68	Filed Amended ANSWER of Elsie W. Cox, Bertha A. Broglie, Ralph J. Del Coro, Harry W. Bogaars, Jr., Richard M. Hough, Anna Marie Schlereth, Alix Ann Arlinghaus, andRosalie M. Arlinghaus to complaint.	CL&M
2-68	Filed consent and order to service by defts. indicated, of an amended answer, dated 12/3/68 to take the place of the answer heretofore servedby defendant Rosalie M. Arlinghaus. So ordered. Croake, J.	
16-68	Filed deft's(Pepper) REPLY to amended answer of other defts.	D&R
16-68	Filed defts'(Elsie W. Cox, et al.) jury demand	
0-69	Rec'd. $74,238.54 from Clerk, S.D. of Ohio and deposited same in Registry Acct. #1.	
20-69	Filed true copy of amended order amending order filed 12-12-68 with notation from Cashier's office as follows: Rec'd. $74,238.54 from Clerk S.D. of Ohio & deposited same in Registry, Acct. #I	
-69	Filed Notice of Deposition.	
7-69	Filed Order that the Clerk of the Court pay out of the Registry of this Court the sum of $2,000. to defts. Alexander MacCallum Walcott and William H.MacCallum, jointly; and to deft. Sidney Pepper the sum of $10,484.59 (Total $12,484.59). Ordered that upon the disbursement of the foregoing funds as directed the actions against these parties is discontinued. Weinfeld, J.	
10-69	MEMO.END. on order filed 4/7/69. Mailed out checks #3399, 3400 to Jack A.Rosen,Esq. 25 West 43 St. NY 10036	
7/69	Filed Pltffs notice to take depostion of Deft. William E.Kelley	
-69	Filed stipulation and ordeder adjourning motion of remaining cross-claimants to 12/11/69. So ordered. Murphy, J.	
8-69	Filed Order to Show Cause re: Vacate Notice of Deposition. Ret. 12/11/69, together with affidavit in support thereof.	
19-69	Filed cross-Claimants's reply memorandum.	
26-70	Filed memo-endorsed on pltff's motion filed 12-8-69-vacate notice of deposition: This motion to quash the notice to take deposition of one William E. Kelly, Esq. is denied, and the deposition of said William Kelly is to proceed forthwith. So ordered. Cannella,J. m/n	
1-70	Filed affdvt and order that clerk is directed to withdraw from Registry of court the sum of $61,753.95 and to purchase interest earning US Treasury Bonds in the amount of $61,753.95 and to hold said bonds in registry to abide with judgment. Bryan, J. m/n	
8-70	Filed affdvt, stip and order that Clerk is directed to withdrawn from registry of court the sum of $61,753.95 and deposit said sum in a one year time deposit acct. in Manufacturers Hanover Trust Co. and shall hold receipt of time deposit in registry of court to abide the judgment of the court. The order of Bryan, J. filed 4-1-70 is rescinded. Bryan, J.	
11-70	Complied with the within order of the court by depositing the said sum of money in a 1 yr. time deposit account in Mfg.Hanover Trust Co. Check #3714-$61,753.95. Envelope #1492-Clerk.(endorsed on order filed 6-8-70).	
0-70	Filed deft's(S.Pepper) affidavits, 9(g) statement & notice of motinn-summary Judg. ret. 7-21-70.	
10-70	Filed deft's memorandum in support of his motion for summary judgment.	
20-70	Filed stip to adj. deft'sPepper's motion for summary judgment, ret 7-21-70 to 8-19-70.	
4-70	Filed stip that deft Pepper's motion ret. 8-25-70 is adj. to 9-22-70	

Cont'd on pg #2

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110 Rev. Civil Docket Continuation

case 3

DATE	PROCEEDINGS	Jr
Sept.15-70	Filed statement of remaining counterclaimants purs.to rule 9(g).	
Sept.15-70	Filed cross-claimants' memorandum in opposition to deft.Pepper's motion for summary judgment.	
Sept.15-70	Filed affidavit of William E. Kelly in opposition to motion for summary judgment.	
Jan.27-71	Filed mem-endorsed on deft's motion filed 7-10-70-summary judgment. The court sees no triable issue of fact here. Deft. Pepper's motion for summary judgment is granted. Settle order on notice. McLean,J.	
Jan.29-71	Filed cross-claimants' supplementary memorandum in opposition to deft Pepper's motion. (filed in court 9-23-70)	
Feb.25-71	Filed cross-claimants notice of appeal from the order entered on 1-27-71. Mailed copy to Dugan & Rosen.	
Mar. 1-71	Filed undertaking for costs on appeal by Fidelity & Deposit Co. in the sum of $250.00	
Mar. 1-71	Filed cross-claimants true copy of an undertaking for costs on appeal	
Apr.6-71	Filed Deft's(Pepper's) Memorandum in response to proposed judgment.	
Apr.6-71	Filed " " memorandum in support of order .	
Apr 6-71	Filed affdvt of Preben Jensen in support of proposed judgment	
Apr. 6-71	Filed order granting motion of deft. Sidney Pepper & dismissing the the crossclaims as against said deft & directing the clerk to withdraw the amount indicated which is deposited in Manufactures Hanover Trust Co., plus the accumulated interest upon the expiration of the said time i.e.,June 11,1971, and to deposit, said sum in the Registry of this court-,McLean, J. Judg. Ent. Clerk. Mailed notice. Ent.4-8-71	
Apr.6-71	Filed Memo-Endorsed on order filed this date: & attached to order, in view of the fact that no payment can be made until June 11,197 there is no need for a ten-day stay, as requested by the stock-holder defts- etc., McLean,J. Mailed notice.	
Apr.15-71	Filed pltff's notice of appeal from order entered on April 6,1971, Mailed copies to Dugan & Rosen & Harper & Matthews.	
Apr.19-71	Filed cross-claimants affidavit & notice of motion to stay enforcement ret.4-27-71.	
May.10-71	Filed stip to adj. cross-claimants motion ret.5-11-71 to 5-25-71.	
May.19-71	Filed order that the firm of Harper & Matthews is substituted as attorneys for deft. Sidney Pepper in place of Dugan & Rosen, McGohey,J.	
Dec.10-69	Filed Cross-claimants memorandum in support of their motion for a protective order.(Entered on 5-24-71)	
Dec.10-69	Filed answering affidavit of J.A. Rosen in opposition of various deft's to motion to stay or quash notice to take depositon of William E. Kelly.(Entered on 5-24-71)	
Dec.10-69	Filed supplemental answering affidavit of J.A. Rosen .(Entered 5-24-	
Dec.17-69	Filed affidavit of D.A. Maher pursuant to rule 9(f).(Entered 5-24-71	
Sep.23-70	Filed deft's (Pepper) reply brief.(Filed in court) (Entered 5-24-71	
May.25-71	Filed notice that record on appeal has been certified & transmitted to the USCA.	
June 4-71	Filed affdvt of Vincent Uihlein (for deft Pepper) in opposition to part of cross-claimants staying execution	
June 7-71	Filed Undertaking for costs on appeal $250 ---Fidelity & Deposit Co.	
June 7-71	Filed affdvt, stip & ORDER that upon expiration on 6-11-71, of the 1 year time deposit made with Mfg. Hanover Trust by the Clerk of the Court , Clerk shall withdraw the entire fund deposited & the accrued interest from said deposit & shall immediately redeposit the fund & interest in an interest bearing acct.	

JUDGE DUFFY

First National Bank of Cinncinnati vs Sidney Pepper et al

68 CIV 457

	PROCEEDINGS	Date Ord Judgment
	with th Mfgs. Hanover Trust Co. & it is ordered that Clerk of Court shall hold the receipt for the new deposit acct. in the Registry of Court, there to abide the further direction of Court-Creake,J. m/n	
8-71	Filed memo endorsed on motion filed 4-19-71---Motion withdrawn-So ordered-Lasker,J.	
8-71	Filed notice of entry of Undertaking for Costs on Appeal with affdvt of service	
28-71	Filed stipulation between deft Pepper & remaining cross claimants that the annexed order & supplementary opinion, from which the remaining cross-claimants appeal, be deemed a part of the record on appeal & be included in appendix on appeal	
6 71	Filed Notice that the suppl. record on appeal has been certified & transmitted to the U.S.C.A. for the 2d Circuit this 6th day of July 1971.	
6-72	Filed defts-Cross claimants notice to take deposition of deft Sidney Pepper on 1-11-72	
31-72	Filed true copy of USCA order & Opinion that the orders of USDC are reversed & action remanded to Dist. Ct. for further proceedings consistent with opinion of this court with costs taxed against the defts'-Appellees Sidney Pepper et al in sum of $1,596.42 & Docketed as a judgment #72,203 on 2-1-72 & it is further ordered that motion to amend the complaint by adding a fourth cross-claim against deft-appellee is denied with prejudice to its renewal in Dist. Ct. m/n	
21-72	Filed defts' Cross-claimants affdvt, notice of Motion & Motion to supplement amended answer & cross-claims by asserting two additional claims ret. 4-4-72	
21-72	Filed defts-Cross-claimants memorandum in support of Cross-claimant Arlinghaus' motion to supplement the pleading	
24-72	Filed defts-cross-claimants notice to take deposition of deft Sidney Pepper on 1-11-72	
4-72	Filed stipulation that cross-claimants' motion is adj. from 4-4-72 to 4-11-72	
12-72	Filed memo endorsed on motion filed 3-21-72---Motion consented to--Order submitted-Motle	
12-72	Filed Consent Order that motion is granted in all respects & it is further ordered that attys. for defts-cross-claimants shall serve a copy of supplemental amended answer with cross-claims on attys. for deft-Sidney Pepper on or before 4-14-72 & it is ordered that deft Pepper shall serve his reply to the supplemental amended answer with cross-claims on or before 5-23-72 Motley,J.	
14-72	Filed defts Cox et al supplemented amended ANSWER to complaint with cross-claims against Sidney Pepper	CL&M
22-72	Filed deft Pepper's REPLY to supplemental amended answer with Cross-claims	
31-72	Filed defts-Cross-claimants affdvt, notice of motion & motion to strike certain paragraphs ret. 6-6-72	HR&M
31-72	Filed defts-cross-claimants'memorandum in support of their motion tostrike paragraphs from reply of deft Pepper to supplemented amended answer	
5-7	Filed stipulation that deft s'-cross claimants' motion to strike designated pleading: paragraphs of deft Pepper's reply ret. 6-6-72 is adj. to 6-13-72	
9-72	Filed affdvt of Ben Matthews in opposition to motion to strike	
une9-72	Filed deft Pepper's memorandum in opposition to cross-claimants' motion to strike paragraphs from his reply to their supplemented amended answe	
13-72	Filed In Court defts-cross-claimants' reply memorandum in support of their motion to str	
13-72	Filed in Court reply affdvt of Preben Jensen(for defts) in support of motion to strike p	
23-72	Filed affdvt of service of notice of motion to deft Pepper's attys.	
28-72	Filed memo endorsed on motion filed 5-31-72---Motion denied-Leave to plead is granted-So ordered-Cooper,J. m/n	
.26-72	Filed reply of defts' Cross-Claimants,Elsie W. Cox, et al to deft's Pepper's Cross-Claims.	
.2-72	Filed defts'-Cross-Claimants,notice to take deposition of Steven Weil, as a witness,on 10-12-72.	
15-73	Filed deft's Cross-claimants affidavit & notice of motion granting partial judgment ret. 5-11-73.	
.15-73	Filed deft's cross-claimants memorandum in support of motion ret.5-11-73.	
22-73	Filed Letter from Attys Harper & Matthews dated 5-21-73 to adj motion, ret.5-25-73. Adjournment granted. Duffy,J.	

(CONT'D - PAGE 5)

	PLINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
y.31-73	Filed deft's affidavit in opposition to cross-claimants motion, to strike	
ay.31-73	Filed deft's Pepper's memorandum in opposition to cross-claimants motion to strike.	
Jun.8-73	Filed reply affidavit of P.Jensen in support of motion for, partial judgment.	
Jun.8-73	Filed deft's cross-claimants reply memorandum.	
Jul 19-73 x	Filed memo endorsed on motion papers dtd. 5/15/73, Motion denied, the parties are directed to complete discovery within 90 days after which time the cause will be called for a pre-trial conference and set for trial. No extensions of time will be permitted except in the most extraordinary circumstances, So Ordered Duffy J.	m/n
Jul 19-73	Filed pltff's affidavit of service by Richard Pikna	
Aug 23-73	Filed deft. Sidney Pepper's notice of taking depositions of Modern Talking Pictures Service, Inc. on 9/12/73.	
Aug 23-73	Filed affidavit of service by mail by Blanche Worsley.	
Oct 5-73	Filed Notice that defts Cross Claimants will take deposition of a witness Howard Eberle on 10-15-73.	
Oct. 12-73	Filed deft's Sidney Pepper affdvt by Ben A. Matthews and order to show cause why an order should not be entered directing cross-claimants to pay to deft. Sidney Pepper's counsel, $300. as their expense for travel as indicated and that service of a copy of this order and papers granted upon attys for cross-claimants, on or before 10-11-73- shall be sufficient service, and in the meantime, and until the hearing and determination of this motion all proceedings in the taking of the deposition of Howard Eberle be stayed. DUFFY, J. Ret:10-19-73	
Oct. 19-73	Filed deft's affdvt. by Ben A. Matthews pursuant to Rule 9 (f)	
Oct. 25-73	Filed defts.-cross-claimants affdvt. by David H. Kohl in opposition to deft. Sidney Pepper's motion for an order directing cross-claimant to pay travel expenses as indicated.	
Oct. 25-73	Filed defts.-cross-claimants Memorandum in opposition to Sidney Pepper's motion for counsel's expense for a Florida deposition or, alternatively that it be taken by written interrogs.	
ct. 26-73	Filed memo endorsed on motion ppapers filed 10-12-73. Motion is granted as to the $300.00 expenses. So ordered DUFFY, J. mailed notice	
12-73	Filed deft. Sidney Pepper's memorandum in support of motion for counsel's expense at taking of deposition in Florida.	
21-73	Filed deposition of Howard Eberle dated 11-2-73.	

(CONTD ON OTHER SIDE—PAGE # 6)

	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
14-73	Pre-trial conference held before DUFFY, J.	
12-74	Filed deposition of Sidney Pepper taken 3-24-69 -Volume I	
12-74	Filed deposition of Sidney Pepper taken 5-24-72- Volume II	
ar. 24-75	Pre-trial conference held by FRANKEL, J.	
r. 3-75	Filed stip & order of the issues as indicated to facilitate the trial. So ordered- FRANKEL, J.	
r21-75	Filed defts Peppers proposed findings and conclusions.	
r21-75	Filed Trial Brief on behalf of deft Sidney Pepper.	
22-75	Filed cross-claimant' proposed findings of fact	
y 19-75	Before FRANKEL, J. non-Jury trial begun.	
y 20-75	trial cont'd	
21-75	trial cont'd	
22-75	trial cont'd and adjourned to 6-3-75.	
3-75	trial cont'd and concluded (5 days). Judge's decision-reserved.	
423-B	Filed transcript of record of proceedings, dated May 19,20,21,22,1975 June 3, 1975	
6-75	Filed Opinion # 42926 ---------- Findings of Fact and Conclusions of Law-- for the reasons stated, the cross-claimants will recover on their first cross-claim as follows: Rosalie M. Arlinghaus, Executrix - $48,274.89; Rosalie M. Arlinghaus- $ 4,129.68; Roslaie M. Arlinghaus Custodian for Frank Arlinghaus, Jr.- $3,244.28; Rosalie M. Arlinghaus Custodian for John C. Arlinghaus- $ 3.244.28 ; Anna Marie Schlereth- $ 10,352. 20; Harry W. Begaards, Jr.- $ 5.574.26; Elsie W. Cox- $ 707.84; Richard M. Hough- $589.86; Ralph DelCore- $ 294.94; Bertha A. Broglia- $ 94,39 and Alix Ann Arlinghaus- $ 3,244.28-- TOTAL- $ 79,750.30... All other claims, on both sides, will be dismissed. In the exercise of discretion, the court directs that each side should bear its own costs. The Clerk of the Court will enter judgment in accordance with the foregoing findings and conclusions. So ordered- FRANKEL, J. (m/n)	
8-75	Filed post-trial brief of defts-cross-claimants.	
8-75	Filed cross-claimants' answering brief.	
8-75	Filed post-trial brief on behalf of deft. Sidney Pepper	
8-75	Filed deft Pepper's answering brief.	
8-75	Filed transcript of record of proceedings, dated 5-19, 20,21,22-1975; 6-3-75	

(CONT'D — PAGE #7)

C. J10 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
ug. 8-75	Filed Judgment # 75,671— ordered that the cross-claimants recover of deft. Sidney Pepper as follows:	
	Rosalie M. Arlinghaus, Executrix $ 48,274.89	
	Rosalie M. Arlinghaus 4,129.08	
	Rosalie M. Arlinghaus Custodian for Frank Arlinghaus, Jr. 3,244.28	
	Rosalie M. Arlinghaus Custodian for John C. Arlinghaus 3,244.28	
	Anna Marie Schlereth 10,352.20	
	Harry W. Bogaards, Jr. 5,574.26	
	Elsie W. Cox 707.84	
	Richard M. Hough 589.86	
	Ralph DelCore 294.94	
	Bertha A. Broglie 94.39	
	Alix Ann Arlinghaus 3,244.28	
	Total $79,750.30	
	and all other claims, on both sides, will be dismissed, and the Court directs that each side bear its own costs. Clerk (m/n).	
. 22-75	Filed deft. Pepper's affdvt and notice of motion for an order to vacate judgment, etc. Ret. 8-28-75	
. 22-75	Filed deft. epper memorandum in support of motion to vacate judgment, etc.	
28-75	Filed Stip and Order adjourning deft's motion originally ret.08-28-75 to 09-10-75 and that answering affidavits will be served by 09-05-75. So Ordered. FRANKEL,J	
-03-75	Filed notice of appeal by Sidney Pepper from judgment entered on 8-8-75. Copy mailed to Casey,Lane & Mittendorf atty for defts Cross-Claimants	
05-75	Filed undertaking for costs on appeal in amt.of $250.00 by Fidelity and Deposit Co.	
--5-75	Filed Order consenting to withdrawal of attys of record of Sidney Pepper and that Brauner Baron Rosenzweig & Klingler,Esqs. shall appear in place and stead.So Ordered.FRANKEL,J (m-n)	
-18-75	Filed Notice of Cross-Appeal of cross-claimant-appellee,Rosalie M. Arlinghaus,as executrix of the estate of Frank H.Arlinghaus to the USCA for the 2nd Circuit from the judgment entered in this action on 8-8=75,etc. (m-n)	
9-23-75	Filed Order on Consent vacating Judgment No.75671.So Ordered.FRANKEL,J	
9-24-75	Filed Interpleader Judgment -Ordered that defts cross-claimants recover balance in sum of $79,750.30 and that all other claims on both sides will be dismissed and the Court directs that each side bear its own costs.CLERK.	

Supplemented Amended Answer
with Cross-Claims

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11a

THE FIRST NATIONAL BANK OF CINCINNATI, Plaintiff, -against- SIDNEY PEPPER, et al., Defendants.	Civil Action No. 4570/1968 SUPPLEMENTED AMENDED ANSWER WITH CROSS-CLAIMS

Defendants Elsie W. Cox, Bertha A. Broglie, Ralph J. Del Coro, Harry W. Bogaards, Jr., Richard M. Hough, Anna Marie Schlereth, Alix Ann Arlinghaus, and Rosalie M. Arlinghaus, individually, as executrix of the will of Frank H. Arlinghaus and as custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus, by their attorneys, Casey, Lane & Mittendorf, for their answer to the complaint allege:

FIRST CROSS-CLAIM AGAINST DEFENDANT SIDNEY PEPPER

1. On August 24, 1964, Frank H. Arlinghaus died in Monmouth County, New Jersey, leaving a last will and testament which was admitted to probate by the Surrogate's Court of Monmouth County, New Jersey, on September 14, 1964; letters testamentary thereof were issued by that court to defendant Rosalie M. Arlinghaus ("Arlinghaus") on September 14, 1964; and Arlinghaus thereupon qualified as executrix of said will.

2. Defendant Modern Talking Picture Service, Inc. ("Modern") is a Delaware corporation having its main office in the City of New York.

3. Defendant Sidney Pepper ("Pepper") is an attorney admitted to practice in the State of New York and served as attorney for Arlinghaus and the estate of Frank H. Arlinghaus ("the estate") until May 22, 1968, as general counsel to Modern until May 24, 1968, and as a director of Modern until June 7, 1968.

4. Until June 7, 1968, Arlinghaus, individually and in her representative capacities, owned a majority of the outstanding shares of Modern's common stock, and the remaining individual defendants other than Pepper owned the balance of such shares.

5. On April 8, 1968, Modern's board of directors approved in principle an offer, made by Sonderling Broadcasting Corporation ("Sonderling") and presented to the board by Pepper, for the purchase of Modern's assets and properties.

6. On or about May 13, 1968, a stockholder's suit was instituted in the Delaware Chancery Court for New Castle County by defendant Hough to enjoin the sale of Modern's assets pursuant to the resolution of April 8, 1968, on the ground that the stockholders would suffer irreparable damage thereby.

7. On May 13, 1968, after a hearing held on that day, the Delaware chancellor issued a preliminary injunction, enjoining pendente lite the proposed sale to Sonderling. The chancellor found that Pepper had failed to submit to Modern's board of directors the letter containing Sonderling's proposal, which letter was addressed to Modern's board and sent to Pepper; that Pepper had failed

to communicate the full terms of the proposal contained in the letter; that Pepper had failed to afford the competing group of potential buyers an opportunity to meet the Sonderling offer; that Pepper had had a unique role in these events and a personal interes in the Sonderling offer; and that the resolution, drafted by Pepper, by which the board of directors accepted the offer, contained uncertainties as to what the final purchase price would be.

8. Because of the disclosures made at the hearing in the Delaware Chancery Court, Arlinghaus, on May 22, 1968, discharged Pepper as her attorney and attorney for the estate, and on May 24, 1968, for the same reasons, Modern's board of directors discharged Pepper as general counsel of Modern and rescinded the resolution of April 8, 1968.

9. On May 10, 1968, Modern and its stockholders had received a firm offer, to expire on May 24, 1968, from the competing group of purchasers to purchase all of the shares or all of the assets of Modern, and shortly thereafter all of Modern's stockholders resolved to tender their shares pursuant to that offer.

10. At all times above referred to, Pepper had in his possession the Modern stock certificates owned by Arlinghaus, the estate and defendant Eberle individually and as trustee ("Eberle"), as well as the minute book, stock certificate book, by-laws and other corporate papers.

11. At the time of his discharge as attorney for Arlinghaus and the estate and as general counsel for Modern,

demand was made upon Pepper for the return of the stock certificates, books and papers in his possession, but Pepper refused to relinquish possession thereof, claiming an attorney's retaining lien thereon as security for payment of a fee of $100,000 for services allegedly rendered by him to Modern and its stockholders in the Sonderling transaction and $10,000 disbursements allegedly incurred in connection therewith.

12. Modern and all or some of its stockholders, including Arlinghaus and Eberle, refused to acknowledge the claimed attorney's lien on the grounds that (1) the services rendered, if any, were not legal services, and (2) Pepper has forfeited all right to compensation inasmuch as he had acted in bad faith and disloyally toward Modern and its stockholders in the transaction with respect to which the fee was claimed.

13. Because of Pepper's refusal to return their stock certificates, Arlinghaus, the estate and Eberle were unable to accept the tender offer before its original expiration date, but on or about that date the offer was extended, and the closing was subsequently scheduled to take place on June 7, 1968.

14. On May 29, 1968, Arlinghaus and Modern caused a bond of the Globe Indemnity Company in the amount of $110,000 to be tendered to Pepper as substitute security for the stock certificates, books and papers retained by him, but Pepper wrongfully and maliciously refused to accept the bond or any other substitute security in discharge of his attorney's lien.

15. On June 3, 1968, Arlinghaus, Eberle and Modern instituted a disciplinary proceeding against Pepper in the New York Supreme Court and obtained an order of that court directing Pepper to show cause why an order should not issue directing him to turn over to them their stock certificates, books and papers in his possession.

16. At the return of the motion in the New York Supreme Court on June 5, 1968, the court directed Pepper to turn over to Arlinghaus, Eberle and Modern their stock certificates, books and papers against substitute security and directed Pepper's attorney to negotiate on the same day the terms of the security bond with the attorneys for Arlinghaus, Eberle and Modern.

17. The Supreme Court's direction notwithstanding, Pepper and his attorney refused to negotiate for or accept substitute security on that day or at any other time.

18. When the day of the closing arrived, Pepper demanded payment of the sum of $75,000 as his price for releasing the stock certificates and books so that the closing could proceed.

19. No time remaining for another application to the court, defendants stockholders were compelled to accede to Pepper's demand and, accordingly, on June 7, 1968, they signed an agreement, prepared by Pepper's attorney, to assign to Pepper $75,000 of the purchase price. Copies of that agreement and the assignments executed by the defendants stockholders pursuant thereto are annexed hereto and marked Exhibit "A".

20. On June 10, 1968, the purchasers directed plaintiff, their payment agent, to withhold the sum of $75,000 from the purchase price.

21. By telegram to the purchasers dated June 12, 1968, defendants Cox, Hough, Del Coro, Broglie and Arlinghaus, individually and in her representative capacities, revoked the assignments made by them on June 7, 1968, on the ground that the assignments were obtained through duress and, therefore, were invalid.

22. Defendants stockholders have no adequate remedy at law.

SECOND CROSS-CLAIM AGAINST DEFENDANT SIDNEY PEPPER

23. Defendants repeat and reallege each and every allegation contained in paragraphs "1" through "21" of this answer with the same force and effect as if here fully set forth.

24. Because of Pepper's unlawful retention of the stock certificates belonging to defendants stockholders and his unlawful refusal to accept substitute security in lieu thereof, defendants stockholders have incurred and will incur legal and other expenses in a total amount exceeding the sum of $10,000.

Defendant Rosalie M. Arlinghaus, as executrix of the will of Frank H. Arlinghaus, further alleges:

THIRD CROSS-CLAIM AGAINST DEFENDANT SIDNEY PEPPER

25. Defendant Rosalie M. Arlinghaus repeats and realleges each and every allegation contained in paragraphs

"1" and "3" of this answer with the same force and effect as if here fully set forth.

26. At various times before May 22, 1968, Pepper made demand on Arlinghaus for payment of various sums as fees for legal services rendered to the estate, and Arlinghaus in each instance paid Pepper the sum demanded.

27. Some of the services for which Pepper claimed payment and was paid were not rendered by Pepper but by one Louis Ogust, a New Jersey attorney retained by Pepper as counsel for the estate.

28. Pepper did not pay Ogust for the services which were rendered by Ogust and for which Arlinghaus had paid Pepper.

29. On or about July 3, 1968, Louis Ogust made demand upon Arlinghaus for payment of the sum of $750 for the services rendered by him for the estate, and on July 15, 1968, Arlinghaus paid to Louis Ogust the sum of $750 pursuant to his demand.

FOURTH CROSS-CLAIM AGAINST DEFENDANT SIDNEY PEPPER

30. Defendant Rosalie M. Arlinghaus repeats and realleges each and every allegation contained in paragraphs "1" and "3" of this answer with the same force and effect as if here fully set forth.

31. On August 30, 1971, in a proceeding in the Probate Division of the County Court for Monmouth County, New Jersey, entitled "In the Matter of the Estate of Frank H. Arlinghaus, Deceased," in which Arlinghaus, as executrix of the estate of Frank H. Arlinghaus, was the plaintiff and

Pepper was a party in the position of a defendant, a judgment was duly rendered in favor of Arlinghaus and against Pepper in the amount of $19,842.19 with interest from January 2, 1968, which judgment remains unsatisfied and in full force and effect.

FIFTH ALTERNATIVE CROSS-CLAIM
AGAINST SIDNEY PEPPER

32. Defendant Rosalie M. Arlinghaus repeats and realleges each and every allegation contained in paragraphs "1" and "3" of this answer with the same force and effect as if here fully set forth.

33. At various times before May 22, 1968, Pepper made demand upon Arlinghaus for payment of certain sums as fees for legal services, totaling $19,842.19, rendered to the estate, and Arlinghaus, in good faith, paid Pepper the $19,842.19 he demanded from the estate.

34. On information and belief, some or all of the services for which the estate paid Pepper were not performed on behalf of the estate but for others, including [illegible]t Modern, who paid Pepper for those services.

35. On information and belief, some or all of the services for which the estate paid Pepper were not performed by Pepper.

36. On information and belief, Pepper forfeited the right to compensation for any services he may have performed for the estate inasmuch as he acted in bad faith and disloyally toward the estate in the transactions with respect to which the fee for services was claimed.

37. Pepper never obtained approval for the payment of said $19,842.19 from the Probate Division of the County Court for Monmouth County, New Jersey, and in fact said court specifically disallowed said payment to Pepper in the final accounting of the estate.

38. As a result of the foregoing, Pepper is justly indebted to Arlinghaus for $19,842.19, a sum which has been duly demanded of Pepper but which he has refused to pay.

WHEREFORE, defendants Elsie W. Cox, Bertha A. Broglie, Ralph J. Del Coro, Harry W. Bogaards, Jr., Richard M. Hough, Anna Marie Schlereth, Alix Ann Arlinghaus, and Rosalie M. Arlinghaus, individually, as executrix of the will of Frank H. Arlinghaus and as custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus, demand judgment against defendant Sidney Pepper:

(1) on the first cross-claim, rescinding the agreement of June 7, 1968, and directing payment to defendants of their aliquot shares of the sum of $75,000 paid into the Court by plaintiff, with interest from June 7, 1968;

(2) on the second cross-claim, for the legal and other expenses incurred and to be incurred by defendants by reason of defendant Sidney Pepper's wrongful retention of the stock certificates belonging to defendant Rosalie M. Arlinghaus and the estate and his wrongful refusal to accept substitute security therefor; and

defendant Rosalie M. Arlinghaus, as executrix of the will of Frank H. Arlinghaus, demands judgment against defendant Sidney Pepper:

(3) on the third cross-claim, for the sum of $750, with interest from July 15, 1968;

(4) on the fourth cross-claim for the sum of $19,842.19, with interest from January 2, 1968, or in the alternative on the fifth, alternative cross-claim for the sum of $19,842.19 with interest from the dates of payment;

together with defendants' costs and disbursements in this action.

Dated: New York, New York
April 13, 1972.

CASEY, LANE & MITTENDORF

By_____
A member of the firm

Attorneys for Defendants
Elsie W. Cox, Bertha A. Broglie, Ralph J. Del Coro, Harry W. Bogaards, Jr., Richard M. Hough, Anna Marie Schlereth, Alix Ann Arlinghaus, and Rosalie M. Arlinghaus, individually, as executrix of the will of Frank H. Arlinghaus and as custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus

Office and P. O. Address
26 Broadway
New York, New York 10004
WH 3-3000

Exhibit A
Annexed to Supplemented Amended
Answer with Cross-Claim

MEMORANDUM

Memorandum of Agreement made this 7th day of June, 1968, in the City of New York, by and between Sidney Pepper, an Attorney practicing law under the name of De Witt, Pepper & Howell, in the City of New York, hereinafter called "Pepper" and all of the parties who have hereunto subscribed their names at the end of this instrument, (being the owners of approximately 86% of the outstanding stock of Modern Talking Picture Service, Inc.) hereinafter jointly called the "Stockholders."

WITNESSETH

Whereas Pepper has heretofore performed numerous and varied legal services for the Corporation and the Stockholders consisting of negotiations, agreements, meetings, etc., with the view towards selling either the assets or the stock of the Corporation; and

Whereas, Pepper is presently holding certain Stock Certificates, books, records and papers belonging to some of the STockholders and to the Corporation; and

Whereas, the parties hereto desire to settle their differences and enter this agreement;

Now, Therefore, in consideration of the mutual covenants herein contained, it is agreed as follows:

1. That heretofore Pepper has claimed approximately $116,000 in legal fees and disbursements against the Stockholders and the Corporation for which he has impressed a lien.

2. The Stockholders and the corporation have heretofore denied the validity of the said Pepper [illegible] lien.

3. There is a proceeding now pending in the Supreme Court, New York County under Index #8982/68 to require the said Pepper to deliver up the said Stock Certificates, books and papers upon which he has claimed a lien and the parties hereto now desire to adjust their differences.

4. Accordingly, the parties hereto agree that there shall be paid to Pepper, in full satisfaction of all claims for services rendered to the Stockholders and the Corporation, the sum of $75,000. The said sum is to be paid by the Stockholders only to Sidney Pepper pursuant to the executed assignment attached hereto and made a part hereof.

5. Upon receipt of the said $75,000, Pepper shall have no further claim of any kind or type against any of the Stockholders or the Corporation and the Stockholders on one hand and Pepper on the other hand shall forthwith exchange general releases, releasing each other, *

6. The Stockholders also warrant and represent that they are executing this agreement and the assignment of the $75,000 of proceeds of their own free will in the presence of each other and ~~counsel~~ Attorney, William E. Kelly, Esq., who is present at the execution of this agreement.

7. In the event the Sherman Unger Group do not purchase the corporate stock of the Stockholders on or before June 24, 1968, then it is hereby agreed that the Stockholders and the Corporation, individually and jointly shall restore said Pepper to the same position he held prior thereto and shall cause themselves and the Corporation to return the stock and papers which he has this date delivered to them, so as to reinstate his lien.

* except for John J. Lipsky and any collateral security for said notes any promissory notes executed by Marian J. Pepper, and, in addition, Pepper agrees to execute and deliver a general release to Modern Talking Picture Service, Inc.

In Witness Whereof, the parties have executed this agreement this 7th day of June, 1968

Sidney Pepper

Sidney Pepper

HOPPER TALKING PICTURE SERVICE, INC.

By

Stockholders

Anna Madia Sobelsohn

Harry W. Brozgard Jr.

Wm. H. MacCallum

Alexandria MacCallum per W.H.M.

Elsa W. Cox

Rosalie M. Arlinghaus

Bertha A. Broglie

Richard W. Hauch

Lucia DeCosa

Alix Ann Arlinghaus

Rosalie M. Arlinghaus, Individually, as Executrix under Will of Frank H. Arlinghaus and as Custodian for each and all of her children

Dated: June 7, 1968

25w

We, the undersigned, hereby irrevocably convey, transfer and assign unto Sidney Pepper, His heirs, assigns and representatives, from the funds due and payable to us on the sale of our stock in Modern Talking Pictures Service, Inc., the sums of money set opposite our signatures, and we do hereby direct the Purchasers of the said stock, to pay the said sums assigned to Sidney Pepper to his attorney, Jack A. Rosen, as attorney for said Pepper, out of the first monies due to us on the said sale of our stock. We also direct that the said sums due to Pepper shall be paid simultaneously with the balance of the purchase price of the stock being paid to us. The purchasers referred to are the Sherman Unger Group.

Rosalie M. Arlinghaus — $ 37,842.17
As Executrix of the Estate of Frank H. Arlinghaus

Rosalie M. Arlinghaus — $ 3,236.74
Individually

Rosalie M. Arlinghaus — $ 2,543.16
As Custodian for Frank Arlinghaus, Jr.

Rosalie M. Arlinghaus — $ 2,543.16
As custodian for John C. Arlinghaus

Wm. H. MacCallum — $ 11,236.13
Wm. H. Mac Callum

Alexandra MacCallum — $ 1,268.46
Alexandra Mac Callum

Anna Marie Schlereth — $ 8,114.98
Anna Marie Schlereth,

Harry W. Bognards Jr. — $ 4,369.61
Harry W. Bognards Jr.

Elsie W. Cox — $ 554.87
Elsie W. Cox

Richard M. Hough — $ 462.39
Richard M. Hough

Ralph Del Coro — $ 231.19
Ralph Del Coro

Bertha A. Broglie — $ 73.98
Bertha A. Broglie

[illegible] — $ [illegible]

Rosalie M. Arlinghaus — $ 2,543.16
As Custodian for Alix Ann Arlinghaus

Reply of Defendant Pepper

to

Supplemented Amended Answer

with Cross-Claims

United States District Court
Southern District of New York

THE FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff,

-against-

SIDNEY PEPPER, MODERN TALKING PICTURE SERVICE, INC., et al.,

Defendants,

ELSIE W. COX, BERTHA A. BROGLIE, RALPH J. DEL CORO, HARRY W. BOGARDS, JR., RICHARD M. HOUGH, ANNA MARIE SCHLERETH, ALIX ANN ARLINGHAUS, and ROSALIE M. ARLINGHAUS, individually, as executrix of the Will of Frank H. Arlinghaus and as custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus,

Defendants-Cross-Claimants.

Civil Action No. 4570/1968

Reply of Defendant Pepper to Supplemented Amended Answer with Cross-Claims

FIRST DEFENSE TO FIRST CROSS-CLAIM

1. Admits that he is an attorney admitted to practice in the State of New York, and that from on or about June 6, 1965, in New York he served as an attorney for Arlinghaus and the Estate of Frank H. Arlinghaus and for Modern, and from August 31, 1965 until June 7, 1968, he served as a director of Modern; and, except as herein expressly admitted, denies each and every allegation contained in paragraph 3.

2. Admits that the Delaware Chancellor issued a preliminary injunction, reference to which is hereby made for the provisions thereof; and, except as herein expressly admitted, denies each and every allegation contained in paragraph 7.

3. Admits that he was discharged by Arlinghaus on or about May 22, 1968, and by Modern on or about May 24, 1968;

and, except as herein expressly admitted, denies each and every allegation contained in paragraph 8.

4. Denies knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs 9, 12, 13, 20 and 21.

5. Admits that he refused to relinquish possession of said stock certificates, books and papers in his possession, upon all of which he was asserting an attorney's retaining lien, until his claim for legal fees and disbursements was paid; and, except as herein expressly admitted, denies each and every allegation contained in paragraph 11.

6. Denies each and every allegation contained in paragraphs 14, 15, 16, 17, 18 and 22.

7. Admits that an agreement of settlement was negotiated between the attorney for this defendant and the attorney for all of the defendants named therein, in the presence of and with the knowledge and consent of Sherman Unger, the attorney for the proposed purchasers of the stock or assets of Modern; that the said written agreement of settlement was revised by the attorney for all of the stockholder defendants present at that time, that when this defendant did not want to accept the settlement of $75,000 and the agreement as revised by the attorney for the stockholder defendants, said Sherman Unger advised this defendant and his attorney that, unless this defendant executed the settlement agreement as revised, the purchasers would forthwith buy the assets of Modern instead of the stock of Modern, and as a result this defendant's lien would be worthless; and, except as herein expressly admitted, denies each and every allegation contained in paragraph 19.

FIRST DEFENSE TO SECOND CROSS-CLAIM

29a

8. Defendant repeats and restates his admissions and denials contained hereinabove as to paragraphs 1 through 21 of said supplemented amended answer.

9. Denies each and every allegation contained in paragraph 24.

FIRST DEFENSE TO THIRD CROSS-CLAIM

9a. Defendant repeats and restates his admissions and denials contained hereinabove as to paragraphs 1 and 3.

10. Denies each and every allegation contained in paragraphs 26, 27 and 28.

11. Denied knowledge or information sufficient to form a belief as to any of the allegations contained in paragraph 29.

FIRST DEFENSE TO FOURTH CROSS-CLAIM

11a. Defendant repeats and restates his admissions and denials contained hereinabove as to paragraphs 1 and 3.

12. Denies each and every allegation contained in paragraph 31.

FIRST DEFENSE TO FIFTH
ALTERNATIVE CROSS-CLAIM

12a. Defendant repeats and restates his admissions and denials contained hereinabove as to paragraphs 1 and 3.

13. Admits that at various times before May 22, 1968, defendant requested of the Arlinghous Estate payment of certain sums as fees for legal services and disbursements, totalling $19,842.19, rendered by him to the estate at the instance and request of Arlinghous, and that said estate, in good faith, voluntarily paid Pepper the said sums aggregating $19,842.19, from the estate; and, except as herein expressly admitted, denies each and every other allegation contained in paragraph 33.

14. Denies each and every allegation contained in paragraphs 34, 35, 36 and 38.

15. Denies that prior approval by said New Jersey

Court for payment to him was necessary, and admits that he did not obtain such approval; and, except as herein expressly admitted or denied, denies each and every other allegation contained in paragraph 37.

SECOND DEFENSE TO EACH CROSS-CLAIM AND TO THE ALTERNATIVE CROSS-CLAIM

16. The above-entitled action is an Action of Interpleader brought by the above-named plaintiff.

17. Each of the cross-claims and the alternative cross-claim are improperly pleaded in this interpleader action, and there is no jurisdiction over any of them.

THIRD DEFENSE TO EACH OF THE FOUR CROSS-CLAIMS AND TO THE FIFTH ALTERNATIVE CROSS-CLAIM

18. By the agreement of June 7, 1968 (annexed as Exhibit A to paragraph 19 of the cross-claimant defendants' first cross-claim), cross-claimant defendants represented to this defendant that if he would deliver and surrender to them all of the books and records of Modern Talking Picture Service, Inc. (hereinafter "Modern"), and the certificates of stock of Modern owned by certain of said cross-claimant defendants, upon all of which this defendant had asserted an attorney's retaining lien, that they would pay to this defendant $75,000 by assigning to him from the proportionate shares to be received by them on the sale of their certificates of Modern stock sums aggregating in all said amount of $75,000; that, accordingly, in reliance upon said representations, this defendant did surrender and deliver to said cross-claimant defendants, and said cross-claimant defendants received and retained, the said books and records and said certificates, and this defendant released his said lien thereon; that immediately thereafter said cross-claimant defendants revoked their said assignment to this defendant of

their respective shares of said purchase price aggregating said $75,000, and refused, after the sale of their and of the other stockholders' certificates and receipt by them of the sum of $2,526,000 therefor, to pay said $75,000 to this defendant; that the representations made by cross-claimant defendants as aforesaid were relied upon by this defendant were false and untrue and at the time they were made were known to cross-claimant defendants to be such, and were made by them to deceive this defendant and to mislead him into delivering and surrendering to said cross-claimant defendants said books and records and said certificates and releasing his said lien thereon.

19. By reason of the facts hereinabove alleged cross-claimant defendants come into this Court with unclean hands and are not entitled to the relief that they pray for from this Court or to any relief.

FOURTH DEFENSE TO FOURTH CROSS-CLAIM

20. At all timestherein set forth this defendant has been and still is a resident of the State of New York and was not a resident of nor resided within the State of New Jersey.

21. No summons or other original process was ever served upon this defendant in the proceeding mentioned in said Fourth Cross-Claim.

22. This defendant never appeared in person or by attorney in said proceeding nor did he ever authorize any appearance in his behalf.

23. All of the proceedings in which the alleged judgment referred to in said Fourth Cross-Claim was obtained and the alleged judgment obtained thereby, are null and void

and of no force and effect, and the said Court in which the alleged judgment was obtained, under the Constitution of the United States and the laws of the State of New York, never acquired any jurisdiction of the person of this defendant, and any and all proceedings resulting in the said alleged judgment were without jurisdiction of this defendant and are not binding upon him and, therefore, are unenforceable, null, void and of no effect.

FOURTH DEFENSE TO FIFTH
ALTERNATIVE CROSS-CLAIM

24. The legal services were duly rendered by defendant to the Arlinghaus Estate in the State of New York at the instance and request of Arlinghaus, as Executrix, were necessary to the Arlinghaus Estate, and were of the fair and reasonable value of at least $19,842.19, which amount was paid to him by said Executrix voluntarily.

25. Arlinghaus is a residuary beneficiary under the Will of, and as such is personally interested in the Estate of, said Frank H. Arlinghaus, and, in the event this defendant were compelled to return to said Estate any part of said $19,842.19, Arlinghaus personally and said Estate would benefit thereby and to that extent would be unjustly enriched.

FIFTH DEFENSE TO FIFTH
ALTERNATIVE CROSS-CLAIM

26. Defendant repeats and realleges each and every allegation contained in paragraphs 24 and 25 of this reply with the same force and effect as though herein set forth in full.

27. Having requested defendant's services and

accepted their benefits as aforesaid, Arlinghaus, individually and as executrix is now estopped to assert the fifth alternative cross-claim.

FIRST CROSS-CLAIM AGAINST
CROSS-CLAIMANT DEFENDANTS

28. Defendant repeats and realleges each and every allegation contained in paragraph 18 of this reply with the same force and effect as if herein set forth in full.

29. Because of said cross-claimants' unlawful revocation of their said assignment as aforesaid, and of their refusal to pay defendant said $75,000, defendant has incurred and will incur legal and other expenses in a total amount of at least $15,000.

SECOND CROSS-CLAIM AGAINST
CROSS-CLAIMANT DEFENDANTS

30. At all times hereinafter mentioned this defendant was and is an attorney duly admitted to practice and practicing in the courts of the State of New York.

31. At all times hereinafter mentioned and until on or about June 14, 1968, the cross-claimant defendants owned the great majority of the stock of Modern.

32. On or about April 8, 1968, the Board of Directors of Modern had approved an offer made by Sonderling Broadcasting Corporation (hereinafter "Sonderling") for the purchase by Sonderling of Modern's assets and property for the sum of $2,800,000.

33. This defendant had been active in obtaining said offer from Sonderling and had presented the same to said Board of Directors for its approval as aforesaid.

34. As and for his services in connection with

said offer from Sonderling, in negotiating the sale to it of the business of Modern, and in performing other legal services both in connection with said sale and with other negotiations for sale and related matters, this defendant was to receive $100,000 out of said sales price, all of which had been known to said Board of Directors and had been duly approved and agreed to by it.

35. At all times herein mentioned and until June 7, 1968, this defendant had in his possession books and records of Modern and certificates of stock of Modern owned by certain cross-claimant defendants, upon which he had asserted an attorney's retaining lien, all of which was well-known to the cross-claimant defendants.

36. In the event of a sale of all the stock of Modern the possession by cross-claimant defendants of said books, records and certificates as aforesaid was essential.

37. Before the sale of Modern's assets to Sonderling as aforesaid could be consummated, cross-claimant defendants wrongfully, knowingly, intentionally and maliciously conspired together and entered into an agreement wherein and whereby they sought to deprive, and they did deprive, this defendant of said $100,000, to which he would have been entitled upon consummation of said sale.

38. In pursuance of said conspiracy and agreement, said cross-claimant defendants, on or about May 10, 1968, wrongfully and maliciously agreed to sell to a group known as the "Unger Group" their respective shares of stock of Modern and induced the remaining stockholders likewise to sell their shares to said Group, thereby forestalling and preventing the sale of the assets of Modern to said Sonderling.

39. Further in pursuance of said conspiracy and agreement, said cross-claimant defendants, on or about May 24, 1968, wrongfully and maliciously induced the said Board of Directors of Modern to rescind and revoke its said approval of said sale of assets to Sonderling and its said approval of said payment of $100,000 to this defendant.

40. Further in pursuance of said conspiracy and agreement, said cross-claimant defendants, on or about June 7, 1968, wrongfully and maliciously induced this defendant to enter into an agreement, a copy of which is annexed as Exhibit A to the supplemented amended answer of said cross-claimant defendants, whereby said cross-claimant defendants falsely represented to this defendant that, if he would deliver and surrender to them all of the aforesaid books, records and certificates, upon all of which this defendant had asserted an attorney's retaining lien, that they would pay to this defendant, in compromise and settlement of said $100,000 aforesaid, the sum of $75,000 by assigning to him, from the proportionate shares to be received by them on the sale of their certificates of Modern stock, sums aggregating said $75,000.

41. Further in pursuance of said conspiracy and agreement, said cross-claimant defendants, on June 7, 1968, wrongfully and maliciously induced this defendant to surrender and deliver to them pursuant to said agreement, which he did, the said books, records and certificates, and to release his said lien thereon, which he did, all upon their false and fraudulent representation that they would pay him said $75,000 as provided for in said agreement.

42. Further in pursuance of said conspiracy and

agreement, said cross-claimant defendants, on or about June 10, 1968, wrongfully and maliciously revoked their said assignment to this defendant of their respective shares of said sales price aggregating $75,000, and refused, after the sale of their said certificates and the receipt by them and the other stockholders of Modern of the total sales price of approximately $2,526,000, to pay said $75,000 to this defendant.

43. When the cross-claimant defendants executed said agreement of June 7, 1968, they had no intention whatever of performing on their part thereunder, and wrongfully, maliciously, knowingly and intentionally had executed said agreement, all the time intending and knowing that they would not perform thereunder and that said agreement had been executed by said cross-claimant defendants solely for the purpose wrongfully, fraudulently and maliciously of deceiving this defendant and inducing him to deliver up to said cross-claimant defendants said books, records and certificates and to release his said lien thereon, without receiving said $75,000.

44. All of the foregoing acts were performed by cross-claimant defendants pursuant to the aforesaid conspiracy and agreement with the malicious and willful intent to deprive this defendant of said $100,000 to which he was entitled upon the sale of said assets of Modern, and/or of said $75,000 to which he was entitled under said agreement of June 7, 1968.

45. By virtue of the acts of said cross-claimant defendants as aforesaid, this defendant has been deprived of said $100,000 and/or said $75,000, less what he has received from William H. MacCallum and Alexandra MacCallum Walcott,

and has necessarily incurred and will incur legal and other expenses in a total amount of at least $15,000.

WHEREFORE, defendant Sidney Pepper demands judgment jointly and severally against cross-claimant defendants Elsie W. Cox, Bertha A. Broglie, Ralph J. Del Coro, Harry W. Bogaards, Jr., Richard M. Hough, Anna Marie Schlereth, Alix Ann Arlinghaus, and Rosalie M. Arlinghaus, individually, as executrix of the Willof Frank H. Arlinghaus and as custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus:

(1) dismissing each of the four cross-claims and the fifth alternative cross-claim asserted against him;

(2) granting him judgment for the amount now on deposit in the Registry of this Court to the credit of this action;

(3) granting him judgment on his first cross-claim against said cross-claimant defendants in the sum of $15,000;

(4) granting him judgment on his second cross-claim against said cross-claimant defendants in the sum of $115,000; and

(5) enjoining defendants Arlinghaus and Arlinghaus Estate from taking any further steps in enforcement of the judgment alleged in cross-claimant defendant Arlinghaus' fourth cross-claim;

All with interest thereon, together with defendant Sidney Pepper's costs and disbursements in this action.

Dated: New York, N. Y.,
May 22, 1972.

HARPER & MATTHEWS
By: Ben A. Matthews
A Member of the Firm

Attorneys for Defendant
Sidney Pepper
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Excerpts of Transcript of Proceedings
before Hon. Marvin E. Frankel, U.S.D.J.
dated May 19-22 and June 3, 1975

at the second at which it was signed, a number of them said they didn't intend to carry it out and suggestions were made that $75,000 is the negotiated figure, they would just as soon make it $100,000 because we are not going to pay him anyhow. That was what went on in the course of the discussions leading up to the final drafting of this agreement and it is significant.

I am sure Mr. Dobbins must be aware of that because he apparently read the minutes, that is perfectly clear from the minutes and the transcripts of all that went on at the meeting and during the meeting at which this was signed.

MR. DOBBINS: I would just say --

THE COURT: No, I don't want any more argument. I want you to start putting on evidence.

MR. DOBBINS: Mr. Pepper, with the Court's permission.

S I D N E Y P E P P E R, called as a witness on behalf of cross-claimants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Mr. Pepper, will you state your occupation?

A I am an attorney.

Q Where were you admitted to practice?

December 31, 1967. Had you been paid in full for your services inside the retainer or outside the retainer?

A For all services whatsoever?

Q All legal services, yes.

A No.

Q You had not been paid? How much was owed you as of December 31, 1967 above and beyond this retainer?

A I hadn't determined it.

Q You had not determined it?

A That is correct.

Q Had you informed anyone at the corporation that there was a contingent liability for services in an undetermined amount by you as of December 31, 1967?

A I don't believe to the best of my recollection that we had any specific discussion.

Q Well, general discussion. Did you sit down and say -- who was president of the corporation, Mr. Lenz?

A Mr. Lenz.

Q Did you sit down sometime on or before December 31, 1967 and have a conversation with Mr. Lenz in general terms stating well, Modern Talking Picture owed you a substantial sum of money over and above your monthly retainer?

A I don't recall that but he knew what I was doing. He knew beyond my retainer.

Q What was beyond your retainer?

A The work he assigned to me.

Q What work?

A To screen various corporations who were interested as prospective acquirers of Modern Talking Picture Service.

Q He specifically assigned this to you?

A Yes.

Q As legal work?

A Yes.

Q When was this conversation with Mr. Lenz that he specifically assigned to you as legal work this task of screening corporations?

A When?

Q Yes, when?

A I would assume on numerous occasions beginning as early as 1966.

Q That is starting, as you put it now, around 1966 he assigned this?

A Yes.

Q Did Mr. Lenz say this was outside of the retainer?

A I have no recollection of him using some phraseology like that.

Q In general terms did he say this was considered above and beyond your $1,000 a month?

A I don't recall his making such specific statement.

Q Did he make any general statement along those lines that your job of screening corporations was above and beyond your monthly retainer?

A I don't recall anything to that effect now.

B5 Q Were you paid any sums above and beyond your retainer in the year as of anytime during the year 1966 for the screening of corporations?

A No.

Q How about 1967?

A No.

Q How about as of March 31, 1968?

A No. But we did have discussions in March.

Q This is you and Mr. Lenz had discussions in March?

A Mr. Lenz, the stockholders, the other officers and directors.

Q I am now talking about Mr. Lenz. Did you have discussions with Mr. Lenz in March, March of 1968, that you would be paid for legal services any sum above and beyond your monthly retainer?

A Mr. Lenz was one of the group, if you are referring to private conversations with him, I don't recall any such private conversation.

Q My question is not limited to private conversation,

whether you had a conversation with Mr. Lenz in front of anybody or just you and he alone.

Did you have any conversation with Mr. Lenz, either privately or in front of other people, where you told Mr. Lenz and Mr. Lenz agreed that you would be compensated for legal services above and beyond the monthly retainer, in the month of March 1968?

A You are asking me to give the state of mind of Mr. Lenz.

Q No, I am asking you what you said to Mr. Lenz and what Mr. Lenz said to you about this specific subject, I am not asking you to speculate on Mr. Lenz' state of mind.

A Mr. Lenz was a hostile party at that time. He was trying to steal the company from the widow.

Q I take it that the answer to my question is no, you did not?

A I didn't have any with him.

Q Now, do you recall a man by the name of George Vickers?

A Yes.

Q Was he associated with Modern Talking Pictures?

A Yes.

Q What was his position?

A He was accountant for Mrs. Arlinghaus. Before

A I don't recall doing it but I don't challenge that I did do it.

Q You don't recall sitting down and writing this letter?

A On this date.

Q But do you recall at some time sitting down and writing this letter, correct?

A Yes.

Q Now, the second paragraph states:

"The return includes all legal services for the corporation of the character and amounts heretofore performed which can be performed in the City of New York during customary business hours but not litigation and special services such as trademark services."

And now the concluding sentence is "No charge shall be made by us for any legal services not covered by the retainer except with your prior approval."

By "your prior approval", that is Mr. Lenz' prior approval.

B1 My question to you is did Mr. Lenz in words or in substance give any prior approval, prior to May 22, 1968, when you asserted this lien on the corporation books and records? Did Mr. Lenz give any prior approval to your incurring or charging legal services in whole or in part represented by

this $100,000 to the corporation?

A Mr. Lenz was merely the operating officer. He was not even a stockholder. He got his position because of the unexpected death of his predecessor.

Now, the corporation had at a meeting on April 8, 1968, authorized the payment to me of $100,000 and through Mr. Lenz as the leader of a small faction of stockholders and directors, voted against it.

Q Perhaps we can shorten this whole thing up. This $100,000 that you are talking about refers to $100,000 that you were to receive pursuant to the Board meeting of April 8, 1968?

A Yes.

Q What was the $100,000?

A What is the $100,000?

Q Talking about the $100,000 that you claim you were owed on May 22, 1968, does that $100,000 refer to the same $100,000 that you were to get pursuant to this Board of Directors meeting of April 8, 1968?

A No.

Q It does not?

A The $100,000 for which I was asserting a lien covered all services whatsoever to the stockholders and the corporation in connection with my efforts to procure an

acceptable deal for the disposition of the stock or assets, equity interest of the stockholders in Modern Talking Picture Service.

Q That is what this $100,000 on May 22 represented, correct?

A Yes.

Q Now, did Mr. Lenz ever say to you that you were going to be entitled to $100,000 in relation to the services performed -- did he give any prior approval to your performing services to the corporation represented by that $100,000 which you say was to compensate you for your efforts in finding an acceptable buyer for this corporation?

A Not an acceptable buyer, an acceptable deal.

Q An acceptable deal.

A Your question is did he ever --

Q Did he ever give prior approval?

A Not to me verbally.

Q Did he give it to you in writing?

A As a director.

Q As a director he gave it to you?

A The Board of Directors voted me such payment.

Q In the April 8, 1968 meeting?

A Yes.

Q This was in specific relation to a deal that did

not go through, is that correct?

A That is correct.

Q You are not testifying -- or maybe you are -- does this $100,000 in fact represent $100,000 that you were voted to get on that April 1968 meeting?

A No. What I was claiming as a lien was not exclusively for the deal. It was for all services going back over a two-year period.

THE COURT: Mr. Pepper, the question Mr. Dobbins keeps asking you is when were you given approval to run up a bill for these additional services over the retainer by Mr. Lenz or anybody else with authority to speak for the corporation, if you were given such approval.

THE WITNESS: Eberle and Arlinghaus knew that I had to be compensated.

THE COURT: That is not the question. When was the performance of such services approved as was singularly required by your letter describing the retainer understanding on January 4, 1966?

THE WITNESS: I would say there was no such approval, your Honor.

Q Going to another subject, do you know a man by the name of Ritenour?

A Yes.

Q Would you tell the Court who he is?

A Mr. Ritenour is a former employer of Modern Talking Picture Service, Inc. and when Modern Teleservice department of Modern Talking Picture Service was spun off in 1956 to become a separate entity, Mr. Ritenour became president of that division or that corporation.

Q In connection with this spin-off did Mr. Ritenour have an attorney representing him?

A In the spin-off, no.

Q Did he have an attorney period?

A I don't know.

Q You don't know whether he had an attorney?

A Personally I don't know.

Q Was it not the fact that this alleged claim for $100,000 in fact did not relate to legal services but strictly to efforts to find a suitable deal, is that correct?

A Efforts to procure a suitable deal but I was not acting as a broker or finder.

Q You were acting as an attorney?

A Purely as an attorney.

Q Reading over financial statements, that was purely as an attorney?

A I did that work.

Q I am asking you were you doing it as an attorney?

A In my opinion, yes.

Q On your deposition, you recall being deposed in this action, do you not?

A Yes.

Q On page 101 was the following question and the following answer given by you on March 28, 1972, page 101, line 18:

"Q You mentioned before a conversation that you had with Richard Ritenour. Do you have a present recollection of that conversation?

"A Yes. I remember his telling me that his attorney had informed him that $100,000 was a reasonable compensation for procuring the sale of the business."

Do you recall giving that answer?

A Yes.

Q Do you recall subsequently, that is subsequent to your deposition of March 28, 1972, you came in with various changes which you desired to be made in the deposition? Do you recall that? You came in on the closing of the deposition approximately 19 months thereafter, on October 11, 1973 and do you recall changing that testimony?

A Yes.

Q How was the testimony changed?

A It is set forth in the deposition. In the last

few pages but, Mr. Dobbins, when you asked me the question about Ritenour having an attorney I thought you were asking me about the time of the spin-off which is what you were interrogating me about. At that time I didn't know whether he had an attorney.

Mr. Scharf came into the case later on when Mr. Ritenour tried to buy stock of Modern Teleservice from the stockholders.

Q The reference to an attorney in that answer was to Mr. Scharf?

A Yes. I assumed he was acting for Mr. Ritenour.

Q Mr. Scharf told you that in his opinion $100,000 was a reasonable compensation for procuring the sale of the business, is that correct?

A Mr. Scharf didn't tell it to me. He allegedly told it to Mr. Ritenour who told it to me.

Q Do you recall Mr. Ritenour telling you that?

A Yes.

MR. MATTHEWS: I suggest to the Court counsel already brought out that there were certain changes and there was a change in that answer.

THE COURT: We will get to that, Mr. Matthews. If it is not brought out you can bring it out later.

Q Was this $100,000 claim that you were asserting on May 22, 1968 a claim for procuring the sale of the business?

A No.

Q It was not?

A No.

Q In other words, it is just purely coincidence that the $100,000 for procuring the business happens to coincide with your $100,000 claim for legal services?

A I just don't understand. What claim?

Q You assert a claim on May 22 as I understand your testimony for legal services in the amount of $100,000, right?

A Yes.

B8 Q That claim was not a claim for compensation for procuring the sale of the business, correct?

A Acting as finder.

Q I am using your language that you testified to originally on page 101, reasonable compensation for procuring the sale of the business. That was not the $100,000 claim on May 22, it was not for procuring the sale of the business, is that correct?

A There is a distinction there. The $100,000 covered legal expense alone. A finder's fee would be $100,000 at least in addition to that and I never claimed a finder's fee.

Q Well, what does this reasonable compensation for procuring the sale of the business have relation to, legal services?

A What is the context of the question and answer?

Q Let me read you the question and answer again.

"Q You mentioned before a conversation that you had with Mr. Ritenour. Do you have a present recollection of that conversation?

"A Yes. I remember his telling me that his attorney had informed him that $100,000 was a reasonable compensation for procuring the sale of the business."

The question is as I understand your answer that relates, what you meant in that answer was related solely to legal business?

A I do. Mr. Ritenour was concerned then how much of a reserve he had to establish for legal charges in connection with the sale of the Modern Teleservice and Mr. Scharf informed him that $100,000 would be an appropriate amount.

Q That is for Modern Teleservice?

A Teleservice to set up a reserve or whatever you want to call it for the legal expenses of the sale.

Q This Modern Teleservice as I understand it was the sister corporation to Modern Talking Picture Service, correct?

A It had a lot of identical shareholders but not 100 percent identical.

Q Based upon that you determined $100,000 was a

reasonable charge for legal services rendered in connection with procuring the sale of Modern Talking Pictures?

A Not based solely on that. I had done legal work in connection with other sales and I made substantial charges.

Q With other sales of what?

A Of businesses.

Q I am talking about Modern Talking Picture.

A Well, Mr. Scharf had advised Mr. Ritenour if I understand what you are after, that $100,000 was an appropriate amount to use as a reserve.

Q You did not procure, have anything to do with the work entailed in the ultimate sale of this business to the Unger group, did you?

A You are talking about Modern Picture Service?

Q Yes, right.

A I met with Mr. Unger, I drafted some papers. I think that set of papers that you ultimately use was copied from the set I had prepared for the Sonderling deal.

Q That was a sale of assets, was it not?

A Yes.

Q His deal was a stock sale, was it not?

A Yes.

Q You did not bring this Unger proposal to the attention of either Mrs. Arlinghaus originally or Modern

Talking Picture Service, did you?

A Oh, Mr. Lenz referred Mr. Unger to me to screen and then I discussed with Mrs. Arlinghaus and had a meeting with Mr. Unger and some of the other stockholders and I discovered that Mr. Lenz and Mr. Unger were partners in trying to get the corporate stock from Mrs. Arlinghaus.

Q When did you make this discovery?

A Right after -- let me say I suspected it and it was confirmed to me on the EBTs of Messrs. Oard, Lenz and just exactly when it got confirmation I don't recall.

Q But sometime in May you suspected they were partners, that is Lenz and Unger were partners?

A The other company officers, the whole group went into Unger.

Q Had you at any time prior to May 22, 1968 informed Mr. Lenz or any of this other key group that they should set up a reserve of $100,000 in connection with legal work performed by you for the sale of the business to Mr. Unger?

A It was obvious they weren't going to let the Sonderling deal go through. They did profit by going to court, by withholding information from me and at the moment I don't recall what else they did, but they went to court and got an injunction against it.

Q My question to you, Mr. Pepper, is a simple one.

Did you at any time prior to May 22, 1968 tell me Lenz or any of the other key officers of this corporation that they should set up a reserve for $100,000 for legal expenses to you in connection with procuring the sale of the business?

A No.

Q On October 11, 1973 do you recall making an answer reading this way:

"A Yes, I remember that Mr. Ritenour telling me that his attorney had informed him that $100,000 was a reasonable compensation for legal work in connection with the sale of the business."

Do you recall making that change?

A I made that change but if that was exactly the language I will take your word for it.

Q Let me show it to you. That is page 101, line 24, "Change compensation to read compensation for legal work in connection with the sale of the business."

A I remember the change.

Q My question is do you recall making that change in this line? Do you recall making that specific change?

A I made that change but I don't recall it. I don't doubt your word about it and I assume my counsel have checked it. I have no reason to doubt it.

Q Do you recall the reason why you made that change?

A May I see the prior question that was corrected?

Q Certainly. This is the answer, the pencil notation with the correction (handing to witness).

A Well, this answer was subject to an interpretation that I had been acting as a finder. The fact was I didn't act as a finder.

Q This is Talking Picture?

A I made no finder's charge.

Q You made a finder's charge on that April 8, 1968 deal with Sonderling, did you not?

A No.

Q You did not? Wasn't your $100,000 actually going to be paid out of the $300,000 finder's fee paid to Commonwealth?

A Yes.

Q In other words, there was a finder in the Sonderling deal?

A Yes.

Q That finder, Commonwealth Corporate Development, was to get $300,000, correct?

A Correct.

MR. DOBBINS: I would like to get marked as Cross-Claimants' Exhibit 1-B a letter from a Mr. Shapiro of Commonwealth Corporate Development to Mr. Sidney Pepper dated

March 21, 1968.

(Cross-Claimants' Exhibit 1-B marked for Identification)

MR. MATTHEWS: No objection.

THE COURT: Received.

(Cross-Claimants' Exhibit 1-B for Identification received in Evidence)

Q First of all, Mr. Pepper, do you recall receiving that letter on or about the date indicated, March 21, 1968?

A Yes.

Q This letter had to do with the proposed sale to the Sonderling Corporation which did not go through, correct?

A This refers to both the business of selling the stock or the business itself.

Q It did not have to do with the proposed --

A That sale did not go through.

Q But it had to do with this proposed sale, did it not, this Exhibit 1-B?

A Yes.

Q Now, the third paragraph says:

"Upon closing of the transaction we, i.e. Commonwealth Development Corporation" -- which was the finder, was it not?

A Yes.

Q "Upon the closing of the transaction we, i.e.

Commonwealth will be paid as our fee or commission the excess purchase price paid by Sonderling Broadcasting Corporation over and above $2,500,000. Such fee is to be shared equally between us."

Now, it goes on to say provided however that your fee will be limited to a maximum payment of $100,000.

I take it that such fee, used in the second sentence of that letter, refers to the finder's fee or commission, correct?

A It could be so construed.

Q Is there any doubt in your mind he states up in the first paragraph "Upon the close of the transaction we will be paid as our fee or commission the excess purchase price paid by Sonderling Broadcasting Corporation over and above $2,500,000 such fee to be shared equally between us", is there any doubt in your mind that he is referring to a finder's fee?

A But any commission that he would get as purchase commission would not be shared with me.

Q Do you mean he was not stating the understanding correctly?

A Well, I was not working for a finder's fee. I was not participating in any finder's fee.

Q You obtained approval, did you not, of this letter,

the proposal contained in this letter of March 21 for you to share in such fee from Mrs. Arlinghaus, did you not?

A Yes.

Q You wrote down over on the left-hand side of the paper, just above Mrs. Arlinghaus' approval "Agreed, Sidney Pepper", right? That is in your handwriting?

A Yes.

Q At anytime, either subsequent or prior to the time that you wrote "Agreed" on this letter, did you write Mr. Shapiro and tell him in words or in substance that he was in error when he referred to "such fee to be shared equally between us" and you in fact were not to share in a finder's fee?

A I don't think I did but there was a lot happening then and I was not in my office much during that perio.

Q Is there any real doubt in your mind that you never wrote and gave any modification whatsoever to this proposal of Mr. Shapiro of March 21, 1968, to which you gave written agreement to?

A I don't think I gave any consideration to the distinction bet een fee and commission at that time.

Q In other words, as of March 21, 1968, you were equating a finder's fee with legal services, is that correct?

A I was interested in the ultimate result and the

ultimate result was that I was to be paid $100,000.

Q You were still interested in the ultimate result after May 22, 1968, correct, that you were to be paid $100,000?

A Yes.

Q And that was your reason for asserting a lien on May 22, 1968, that you were to be paid $100,000?

A I had done legal work which, in my opinion, entitled me to at least that compensation.

Q You mentioned a lawsuit that was instituted in the Delaware Chancery Court. Roughly will you tell us when that lawsuit was instituted? Do you recall?

A Sometime at the beginning of May.

Q This lawsuit was instituted by Mr. Hough to restrain the sale of the corporation to Sonderling?

A Yes.

Q There was a hearing on a preliminary injunction.

A Is that a question?

Q Yes.

A Yes, there was.

Q A preliminary injunction was in fact issued by the Chancellor down in Delaware?

A Yes.

Q Do you recall retaining attorneys in that lawsuit?

A I do.

MR. MATTHEWS: Attorneys for whom I would like to know.

MR. DOBBINS: I submit Mr. Matthews has the right to bring that out in his examination, any facts that --

THE COURT: Let us not waste time about it. Let us get it out.

Q For whom didyou retain attorneys?

A For the corporation.

THE COURT: You retained attorneys for the corporation in that lawsuit?

THE WITNESS: Right.

Q You also, pursuing his Honor's inquiry, you also retained attorneys for Rosalie M. Arlinghaus, did you not?

A I don't think she needed representation at that particular time. Her stock had been attached and enough time had not elapsed to give the Court jurisdiction over Mrs. Arlinghaus.

Q You didn't retain attorneys for her then in that proceeding?

A For her?

Q Yes.

A I know the attorney that I retained for the corporation did in fact act for her.

Q He did it at your direction?

A I don't remember. He had a copy of the complaint and put an answer in and argued the case. It all took place inside of three days. Mrs. Arlinghaus was abroad at the time.

Q You could reach her by ship to shore phone. In fact you did put in a call?

A Not at that time. Later when she was on the ship, returning to this country.

Q But she was on a cruise, was she not, she was on a cruise ship the KUNGSHOLM in the middle of April and came back toward the end of May?

A I reached her according to her itinerary schedule on the ship but the ship to shore telephone has a very limited range. I just don't know. I managed to get her there.

Q The KUNGSHOLM was equipped with a wireless and could receive wires, could it not?

A I assume so. I personally have no knowledge.

Q Did you make any attempt whatsoever to contact Mrs. Arlinghaus prior to this day that she docked in late May, either by wireless or by ship to shore telephone?

A I talked to her by ship to shore telephone but it was after the injunction had been granted.

Q I understand that. And my question to you is did

you, prior to the time that you talked to her on this ship to shore telephone, subsequent to the granting of this injunction, did you make any attempt at communicating with her by wireless or ship to shore phone?

A Subsequent to the granting of the injunction?

Q No, prior to it.

A I don't recall.

Q Of course, her daughter was here in Rumson, was she not?

A Yes.

Q Did you make any attempt to communicate with her?

A No.

Q You were present throughout this Delaware Chancery Court proceeding, were you not?

A Yes.

Q You personally retained Mr. Anderson to represent the defendants, did you not?

A To represent whom?

Q The defendants.

A Plural?

Q Yes.

A No.

Q You did not?

A Only the corporation.

Q You only retained Mr. Anderson to represent the corporation?

A Right.

Q That was the limit of his authority?

A Yes.

MR. DOBBINS: First of all I would like to get marked as Exhibit 1-C and 1-D the comlaint in the Delaware Chancery Court and the notice of motion for preliminary injunction.

xx (Cross-Claimants' Exhibits 1-C and 1-D marked for Identification)

THE COURT: Let us take a ten-minute recess.

(Recess)

B10 MR. DOBBINS: We offer Cross-Claimants' Exhibits 1-C and 1-D for Identification in evidence.

MR. MATTHEWS: No objection.

xx (Cross-Claimants' Exhibits 1-C and 1-D for Identification received in Evidence)

MR. DOBBINS: We would like to offer at this time as Cross-Claimants' Exhibit 1-E a certified copy of the transcript and the Chancellor's findings on the hearing for a motion for preliminary injunction.

MR. MATTHEWS: No objection.

xx (Cross-Claimants' Exhibit 1-E received in Evidence)

BY MR. DOBBINS:

Q Handing you 1-C, Mr. Pepper, -- first of all, you saw that complaint prior to the hearing, did you not, in the Delaware Chancery Court in Wilmington?

A I probably did.

Q You will note it lists several defendants, Modern Talking Picture Service, Inc. and goes down the list, Rosalie M. Arlinghaus individually and as Custodian for various minors and as Executrix of the Estate of Mr. Arlinghaus.

Now, it is your testimony you did not retain Mr. Anderson to represent any of the individual defendants listed there?

A I am pretty sure that I did not. I hadn't been served and Mr. Cox is here. He can testify about it. Eberle didn't tell me that he had been served and Arlinghaus didn't tell me.

Q You were their lawyer on May 13, 1968 at 11:00 a.m. when the hearing commenced?

A This is Monday morning?

Q May 13, I don't know what day of the week it is, Mr. Pepper. But were you there as indicated on the certified transcript, May 13 at 11:00 a.m.?

A Yes.

Q On page 2 after the Court entered the courtroom and said good morning to the various counsel, Mr. Anderson,

that is the person you retained to act on behalf of Modern Talking Pictures, correct?

A Yes.

Q Mr. Anderson said, "Your Honor, I would like to move the admission of Mr. Becker who is associated with me in the representation of the Sonderling Company." And then he goes on, "On Friday I appeared on behalf of the Talking Picture Company and this morning I am authorized to appear on behalf of the defendant Sonderling Company and also on behalf of Mrs. Arlinghaus both individually and as Custodian and as Executrix under the Will of her late husband."

Now, when Mr. Anderson gave that representation did you tell him later on or even then that he wasn't authorized to appear for Mrs. Arlinghaus?

A I don't know whether I was there at the time but to answer your question, I didn't correct his statement if that was his statement.

Q It is your testimony you don't recall whether you were there at the start of this hearing?

A That is true.

Q When do you recall being there? You have no recollection of being there when the hearing started, I take it?

A I stayed overnight before the hearing started.

Q Yes.

A Now, whether I was in there when the first testimony was given, I don't know.

Q What is your best recollection, were you there when it started?

A I have no recollection.

Q One way or the other?

A That is true.

Q You do not know as you sit here today where Mr. Anderson got his authority to appear on behalf of Mrs. Arlinghaus?

A I have no recollection.

Q In any event, you did not give it to him?

A To the best of my knowledge I didn't. She had some stock sequestered so I learned later and Mr. Anderson may have undertaken to act for her because of the sequestration proceedings.

Q I am asking not what Mr. Anderson may or may not have done. Did Mr. Anderson tell you that he got in touch with Mrs. Arlinghaus and said that he had received authority to represent her? He didn't know Mrs. Arlinghaus?

A I don't believe he did.

Q Did you have any knowledge that he was appearing on behalf of Mrs. Arlinghaus?

A In fact I didn't know what you are telling me until this moment.

Q In other words, you never knew until today, May 17, 1975, that Mr. Anderson the attorney who you got to represent Modern Talking Picture and Sonderling, you never knew that he also purported to represent Mrs. Arlinghaus?

A Well, I better put it this way, I have no recollection of knowing.

Q Mrs. Arlinghaus in conjunction with her own shares that she held individually as well as Custodian and Executrix, she represented the controlling interest in this corporation, did she not?

A Yes.

Q She was one of the defendants who was opposing this motion for preliminary injunction, was she not?

A On the basis of what you tell me now, yes.

Q She was named as a defendant, you saw that. You testified that you believe that you saw the complaint, did you not, before the hearing?

A I probably saw it but she had not been served, she was abroad.

Q I understand, you testified to that. My point is she was a majority stockholder, correct?

A Yes.

Q And Mr. Anderson on the basis of what you just read, which you say you did not know until now, appeared for her in opposition to this motion for preliminary injunction, correct?

A I really don't know for whom he purported to act and whether he opposed the granting -- I know he opposed the injunction.

Q For whoever he represented?

A Yes.

Q You represented Mrs. Arlinghaus, did you not? You were her personal attorney?

A Not in Delaware.

Q I mean you were purporting to act for Mrs. Arlinghaus when you went down to Delaware?

A I went down as a witness.

Q You weren't furnishing any legal service to Mrs. Arlinghaus, were you, in this motion for a preliminary injunction?

A I didn't participate in the trial. I was not authorized. I was not admitted to that Bar.

Q Mr. Anderson is a capable lawyer and he wasn't trying this off the top of his head. Who was helping, you? Weren't you rendering him any assistance?

A No, Mr. Becker was.

Q I take it none of your $100,000 claim had to do with any legal services that you rendered down in Delaware, is that correct?

A For Mrs. Arlinghaus as an attorney, no.

Q How about for Modern Talking Pictures?

A I didn't represent Modern. I went as an observer.

Q This was not part of your claim for $100,000, correct?

A Sonderling wanted me down there as a witness. I was still trying to close the Sonderling deal. I had to go down there.

Q Did you prior to the institution of that hearing make any attempt to communicate with the majority stockholder, Mrs. Arlinghaus, as to whether or not she did or did not want to oppose this motion for preliminary injunction?

A No, I did not.

Q Going back to the $100,000 fee in relation to the Sonderling transaction, that fee was not limited to legal services, was it?

A That is all I performed.

B11 Q It is your testimony that the fee was limited to legal services, that is the $100,000 fee in the Sonderling deal?

A No -- what fee are you talking about?

Q Talking about the fee that you were discussing before the recess which is set forth in Exhibit 1-B, this March 21 letter from Commonwealth to you relating to the $100,000 which says such fee is to be shared equally between us.

As I understand your previous testimony, that fee was related, at least your share was related solely to legal services?

A That is correct.

Q Isn't it a fact that fee was actually related to all your services and was actually contingent upon the consummation of that Sonderling deal?

A No.

Q It was not?

A I had started performing work in 1966, long before Mr. Sonderling's name appeared before us.

We didn't negotiate with Sonderling until 1968. As far as I was concerned, somebody was supposed to compensate me for all the work from 1966 through 1968.

Q My question is, if there is any misunderstanding, it relates to the $100,000 fee that is the subject of that March 21, 1968 letter, Exhibit 1-B.

You testify that that does relate solely to legal services, is that correct?

A That relates solely to legal services but --

Q Please.

A Mr. Shapiro wrote this letter and didn't know what work I had done before that time.

Q So Mr. Shapiro was really in error in writing that?

A I don't think he had that in mind.

Q Do you recall giving testimony in the Delaware Chancery hearing?

A Yes.

Q You were there and was called as a witness?

A Yes.

Q Incidentally, were you there when Mr. Under testified?

A Probably at some time or other.

Q Did you come in and out of that hearing, walk in and out?

A Yes.

Q Did you give these answers to these questions by your attorney Mr.Anderson on page 240 of the transcript?

A I beg your pardon, Mr. Anderson was not my attorney.

Q Were you a defendant in the action, weren't you?

A But I was not a party to the proceeding.

Q Weren't you a defendant in this action?

A I got the X marked through the diary entry on June 5, whichever was the substance of the conversation, on June 4 or 5. I have no synopsis of it.

Q But in point of fact you did turn over Mr. Eberle's stock certificates on June 7?

A On June 7, yes, as part of the overall settlement.

Q Did you ever appear other than specially in this action that was instituted in the New York Supreme Court?

A I personally didn't have anything to do with that action except through counsel.

Q Did you contest service?

A I thought he did. I thought I read in one of the papers turned over to me this morning.

Q Did you instruct him to contest service?

A I have no recollection.

Q Whether you did or not?

A Right.

B18 Q Didn't Mr. Eberle specifically direct you not to deliver up the stock?

A I don't know whether he said so in so many words but that was the substance of our conversation.

Q That you were not to deliver it up?

A I didn't have to deliver it to her.

Q You didn't have to deliver it. My question is

did he specifically direct you not to deliver it up?

A He didn't specifically direct me to deliver it up.

THE COURT: Why don't you answer the question. Did he ever tell you not to?

THE WITNESS: I don't recall, your Honor.

Q Let's see if I can refresh your recollection.

On your examination before trial, May 24, 1972 at page 331:

"Q I draw your attention again to the letter of Rosen dated June 5 and particularly to the statement, the second to last paragraph that Mr. Eberle has not discharged Mr. Pepper, the deponent has specifically directed Mr. Pepper not to deliver up the stocks and papers. I ask you was it a fact that on or about June 5 Mr. Eberle had specifically directed you not to deliver up the stock and papers?

"A It would appear so.

"Q What makes it so appear to you, Mr. Pepper?

"A I don't think Mr. Rosen would consciously make a misstatement.

"Q Is that your only basis for your answer?

"A As I have stated before, I knew of no statement by Mr. Eberle to deliver the stock and papers.

"Q The question is whether you do know of a statement

THE COURT: Do you mean by the question what did you do for this $100,000?

MR. DOBBINS: No, your Honor, how was the $100,000 arrived at, that figure, as opposed to one hundred fifty, fifty, et cetera, arrived at other than by negotiation.

A As I testified, I had heard from Mr. Ritenour that $100,000 was a fair estimate of what the legal expenses might run into in an acquisition of this type, with all the complications pertaining to the motion picture business.

I personally had been involved in other acquisitions where I got $50,000 for my firm and they weren't as complicated as this was and it was sometime before.

That to the best of my recollection is how I in my own mind arrived at the $100,000 figure.

Q I see. You arrived at the $100,000 figure and communicated this both to Sonderling and Commonwealth?

A I don't know whether I communicated it to Sonderling. I do know I mentioned it to his accountant that I was looking for $100,000 and he wanted me to sort of conceal it by paying it to Commonwealth initially and letting Commonwealth compensate me.

Q Well, you mentioned this $100,000 figure and this is the figure in your mind from your conversation with Mr. Ritenour.

Why did you not mention $100,000 to Mr. Unger?

A I thought you said I mentioned it to him, Mr. Unger?

Q I know. That is what Mr. Unger testified to and I recall your testimony, you denied that.

A No, I have no recollection of discussing it with him.

Q You mean you don't have a recollection one way or the other?

A That is correct.

Q You may very well have discussed it with him?

A I may have. He knew I had to make a living and wasn't a member of the Arlinghaus family. I certainly expected to be compensated.

Q You told him that in words or in substance that you had to make a living and expected to be compensated?

A I don't know whether I said that I had to make a living. That was in my mind, I had to make a living.

I had been counsel for the company for some 30-odd years and I didn't receive any bonuses and there was no promise of a bonus by anybody. So if I didn't speak out for myself, nobody would have thought of doing anything for me.

Q In other words, you looked out for yourself, there was nobody there to look after you?

A I would say that would be true.

Q Therefore you took pains to look after yourself I take it?

A Well --

Q As best you could?

A I asked for compensation.

Q This $12,000 retainer took up most of your time?

A No.

Q How much time would you say it took up?

A Whatever was called for. At times I was busier than usual.

Q Roughly, in your practice, how much would this retainer take up, the work?

A I don't recall. I would just be guessing. I had other clients if that is what you want to know.

Q Yes.

A I had other clients who fortunately gave me business and paid for it.

Q Were you also at this time in March of 1968, also counsel for Modern Teleservice, were you not?

A Yes.

Q Getting a retainer from them?

A Yes.

Q After Sonderling acquired them you continued on that retainer, did you not?

Do you recall Mr. MacCallum presenting the Unger offer to the Board?

A No, but we have the minutes and we can see what the minutes say as to what was presented.

Q Did you in point of fact present to the Board the offer that you purported to have accepted on March 22 on behalf of the principal stockholder, Mrs. Arlinghaus?

A I did not present any letter from -- any one of the four letters from Mr. Sonderling to the Board on March 22.

Q Regardless of letters, did you tell the Board in words or in substance that Mr. Sonderling of the Sonderling Broadcasting Corporation had made an offer to purchase the corporation for $2,800,000?

A This was not a firm offer. It was merely an offer to negotiate and there was a question in my mind whether we could entertain any offer for the sale of the business without additional tax liability, unless theretofore we had adopted a plan for the dissolution of the corporation, so that the offer would be accepted by a corporation liquidation.

Q Now, the second paragraph of Exhibit 12, that is your letter of March 22, 1968 to Mr. Sonderling states:

"On behalf of Mrs. Frank B. Arlinghaus, Executrix of the Estate of Frank H. Arlinghaus and Custodian for her children and on behalf of Mr. Howard Eberle, Trustee under a

Trust for his benefit the owners of close to 70 percent of the outstanding stock, I accept your offer."

Did you in fact inform the Board of Directors on March 22, 1968 at the Board of Directors meeting that you had purported to accept this offer of Sonderling on behalf of 70 percent of the outstanding stock of the corporation?

A When you say this offer, you mean this offer for the stock?

Q I mean the offer that you purported -- let's not quibble about it.

A I am not quibbling, I am talking like a lawyer.

Q I am talking like a lawyer too. I am talking about the offer that you purported to accept, that is your term, not mine, your offer. I accept your offer.

Did you tell the Board of Directors that you accepted Sonderling's offer on behalf of 70 percent of the outstanding stock of the corporation?

A For the reasons I have already enunciated, I did not make a formal declaration to the Board. I think the entire Board was aware of what was going on.

Q You say you did not make a formal declaration to the Board?

A Right.

Q Did you tell the Board informally, in words or in

substance, that you had accepted this Sonderling offer at the Board meeting?

A The directors present knew what was going on. They knew that I had written to Sonderling.

Q Did Mr. MacCallum know?

A I assume so. He was pretty close to Mr. Lenz and Mr. Vickers and Mr. Vickers got a full report from Mrs. Arlinghaus regularly.

Q On that basis my question is did you inform them? Did you tell the Board this offer had been accepted?

A In so many words, no.

Q Words or in substance?

A They knew about it.

Q That is not my question.

A I didn't inform them for the reasons I have stated.

Q Did you tell on March 22, call Unger and tell him "Don't come to New York on March 25, I have already accepted an offer"?

A I don't recall any such conversation with Mr. Unger. All I can say is that his partners in making the offer comprised the key executives of the corporation and he undoubtedly was instantly informed about what happened within the company.

Q Was he informed by you?

A Not by me.

among the shareholders.

Q Which was not contained in the original consent that you drafted, No.14 in Evidence dated April 8th?

A This was a sale of assets and this dealt with the sale of stock.

Q So by April 25 you decided to go the sale of stock route?

A It is not that I decided. It was a question whether Mr. Sonderling still hoped to make his peace with the holdout shareholders.

He made his peace with MacCallum and I don't think he was able to get anywhere with the remaining three small stockholders. He refused to be, what shall I say, held up any further.

Q Going to paragraph 3 it states, "Of the monies received by DeWitt, Pepper & Howell from Sonderling, they are hereby authorized to pay Commonwealth Corporate Development Company for its services in bringing about such sale the sum of $300,000 of which half shall be paid on Janury 2, 1969 with authority to pay to Sidney Pepper, counsel and director of Modern for services in connection with such sale $100,000 provided he makes no charge to the selling stockholders for his services in connection with such sale."

Why did the first consent read Sidney Pepper a director

if you will look at it, pay $100,000 to Pepper a director of Modern. Why did you insert counsel in this particular draft, the April 25 draft?

A I can't recall my mental processes but I will assume that since this was dealing with legal charges I used the word counsel in there.

Q By this you are referring to paragraph 3, the $100,000 mentioned in paragraph 3 of Exhibit 15, correct?

A Yes.

Q Was the $100,000 referred to in Exhibit 14, was that dealing with legal fees? It was not, I take it?

A It did not refer to legal fees. It deal with legal fees.

Q In other words, it is the same $100,000, both referring to the same $100,000?

A Right.

Q What was the reason for inserting this "counsel" in paragraph 3 of Exhibit 15?

A As of this moment I can't recall everything that I thought of. This may have been abandoned after I got the first signature. I don't know whether it was submitted to anybody else.

Q You have no recollection now, no recollection as to why you added the term "counsel" to your description as

recipient of that $100,000?

A Because I don't know but the fact that it refers to my not making any charge for services, i.e., legal services, must have been the reason.

Q Now, you had a Board of Directors meeting on April 8, 1968, did you not?

A Yes.

Q To approve an asset deal from Sonderling -- to Sonderling, correct?

A Yes.

Q At that meeting did you show any of the officers of Modern or any of the members of the Board of Directors, your copy or any other copy of the March 20, 1968 letter from Sonderling?

A I don't recall specifically having done so but they were all acquainted with one of the versions of the March 20 letter from Sonderling.

Q You knew they were all acquainted?

A Yes.

Q All the officers?

A Yes. I met with almost all of them on April 5 to go with Sonderling and Mrs. Arlinghaus. We were present at an indoctrination meeting to explain and to introduce Mr. Sonderling to them.

prevail upon Fuqua Industries, Inc. to interest itself in acquiring the stock or business of Modern Talking Picture Service, Inc.

"Mr. Ritenour offered to try to pursuade management to acquiesce in the sale of the business on some assurance that he would not be hostile to them if both companies wound up in common ownership and that, in any event, if management walked out, as they had threatened to, Mr. Ritenour would acquire for the corporation personnel capable of running the business of the corporation.

"Q Have you given us now your total recollection of the conversation at Baltusrol?

"A Of the substance. There were probably small pleasantries and so on."

And at the bottom of page 202, line 20:

"Q My initial question was: When did Mr. Arlinghaus ask you to act as her attorney in the sale of her interest in MTPS and you mentioned as one of the occasions when she did so the conversation you had when she saw the Sonderling letter of March 20.

"A Oh, prior to that -- oh, I testified that she wanted me to proceed with the subject matter at Baltusrol and prior to that we discussed the question of the sale of her stock and I advised that it be deferred until the IRS

completed its State Tax audit.

"Q Will you hold it a minute, Mr. Pepper. You are now talking about Baltusrol?

"A No, I am talking about the period prior. In the fall of 1967 when I first started trying to get an acceptable deal.

"Q Let's see whether we can approach this chronologically. When did you first start to get an acceptable deal as you say?

"A To look for an acceptable deal? In the fall of 1967."

Did you give those answers to those questions?

A Probably.

B31 Q Did you put in a thousand hours from December 1967 up to March 20, 1968, did you?

A I was under the impression that I did.

MR. UIHLEIN: His testimony was --

THE COURT: No, please, this is very important and your interruptions aren't going to be useful.

MR. UIHLEIN: He misstated the facts.

THE COURT: Do not interrupt at this point. The witness is an attorney and I watched him and I find here certain contradictions of great interest to me and your getting up at such a juncture is not good.

(Pause)

MR. DOBBINS: I will offer as Cross-Claimants' Exhibit 22 the original of a letter from Carl H. Lenz to Mr. Sidney Pepper dated January 20, 1967.

MR. MATTHEWS: No objection.

xx (Cross-Claimants' Exhibit 22 received in Evidence)

THE COURT: All right, thank you.

Q You produced this letter in response to my request for the production of the additional letter relative to your retainer?

A Yes.

Q The first paragraph --

THE COURT: I just read it.

MR. DOBBINS: All right, fine. No further questions.

THE COURT: Do you want to examine, Mr. Matthews?

CROSS-EXAMINATION

BY MR. MATTHEWS:

Q Mr. Pepper, will you briefly to complete the record tell us the history of Modern Talking Picture Service, Inc.?

A With the advent of sound motion pictures AT&T started a sound motion picture department in the late 1920's or early 1930's to exploit sound motion picture equipment in connection with the distribution of motion pictures.

At that time one of the executives of the company approached Benjamin P. DeWitt, my partner. We had been very active in the motion picture industry and asked him to please be good enough to recommend someone to head up their new talking picture division.

Mr. DeWitt recommended Mr. Arlinghaus, Mr. Arlinghaus got the position and he worked for the Electrical Research Products, a subsidiary of AT&T until 1937 or 1936.

B35 At that time the Government was threatening AT&T with an anti-trust suit and AT&T decided it preferred to spin-off or to divest itself of this motion picture division because it was alien to their telephone communications business.

For the sum of $5,000 the common stock of the company was transferred to Mr. Arlinghaus as voting trustee to hold for the other employees in proportion to their salaries at the time.

As the chief executive of the company, Mr. Arlinghaus got the biggest amount of stock but his total investment, of the whole group, was less than $5,000 or thereabouts and some of it was loaned to them by American Telephone & Telegraph Company.

American Telephone retained the preferred stock which represented the big bulk of the assets of the corporation.

I should go back and state that a new company was in-

corporated under the name of Modern Motion Picture Service to carry on the business theretofore conducted by Mr. Arlinghaus for AT&T and that company had approximately $100,000 in preferred stock issued to AT&T and 5,000 of common of no par value issued to Mr. Arlinghaus.

During one of the war years it became advantageous -- I just don't remember the full tax benefit situation, but AT&T decided to sell its preferred stock to Modern Talking Picture Service for a token amount. This gave them a tax loss which they recouped or offset against their high income during the war years

The upshot was that Mr. Arlinghaus became president and sole stockholder as voting trustee of Modern Talking Picture Service. He then continued to conduct that business with Mr. MacCallum, Mr. Eberle, Mr. Bogaards who were part of the original group.

With the utilization of IBM equipment, the company for the first time was able to make money. Their business was the making available to companies, large American industrial companies most of whom were listed on the New York Exchange, making available to the general public, church groups, American Legion Posts, schools, of free motion pictures sponsoring the products -- not sponsoring but advertising the products of the sponsors of the motion pictures.

In other words, General Motors would make a motion picture of a Cadillac going through the jungles in Africa with no roads, through the muck and people would see it at their meetings and would be greatly impressed by the performance of the Cadillac and hopefully they would buy a Cadillac.

For that service, in shipping the pictures to the church groups or the school, Modern got a sum I think of $1 or $2 for each showing. It was not a great sum and considering in those days everything was done by clerks, it gave them very little profit.

Mr. Arlinghaus got the inspiration to put in IBM equipment and the machines did all that work. He was able to turn a profit for the first time and the business began to prosper. He expanded it to make it a national company and he made international with agencies in other countries.

At the time of the aborted Sonderling deal I think the company had about thirty-five American offices and several Canadian offices. It had grown to about 300 employees.

Well, in 1956 the motion picture theatrical union, which was then in mobster control in Chicago tried to unionize the television division and Mr. Arlinghaus was apprehensive if it succeeded in doing so it would spread to his thirty-five offices and he would have to increase the number of employees

of cash or securities?

A The Estate just has two closed corporations with no market for their holdings and it had a big debt to the Governmenc for estate taxes which could have increased very substantially because the Government was contending that it had the right to tax the whole voting trust, namely 100 percent, of both companies to the Estate.

Q Your law firm including Mr. DeWitt during his lifetime and Mr. DeWitt handled Mr. Arlinghaus' Estate in New Jersey, did he not until his death?

A He did, yes.

Q Did Mr. DeWitt?

A In my law firm. You would have a distinction. Mr. DeWitt practiced as an individual in New York. Our firm was a New York firm. We had no right to practice in New Jersey as such

Q But you continued work on the Federal estate tax return and concluded that?

A Yes.

Q Did you not?

A Yes.

Q Was it at Mrs. Arlinghaus' suggestion you arranged to raise some money on the stock by screening possible or prospective purchasers of the business, the stock that she

and the Estate held?

A It originated in this fashion: An effort was being made by management to acquire control of the company. They conceived a plan to dilute her holdings to bring it below a majority and they figured thereby they could then do as they saw fit with the company.

She owned about 56 percent and a plan was submitted by Mr. MacCallum acting on behalf of the management employees, to make stock available to employees for purchase at discount prices. That stock was to be contributed by the various stockholders to the treasury for that purpose.

If that were to go through at the time in question, the nonstockholder management group controlled the Board of Directors. It is strange but they had outsiders really in control of the company.

Q Now, I show you two memoranda in longhand one dated in the upper right-hand corner 8/23/66 and the other 9/1/66. I ask you if these are the suggestions of Mr. MacCallum to which you referred. Those are Exhibits E and F.

A Yes.

MR. MATTHEWS: I offer the original Xerox copies and submit typewritten copies.

MR. DOBBINS: Let me see them.

THE COURT: Suppose we resume at 2:15 and you can

get organized.

MR. DOBBINS: If I may bring it up, I do have Mr. Vickers who is coming in this afternoon. He comes from Pennsylvania and he will testify about the April 8, 1968 meeting and his visit to Mr. Pepper's office on May 21 and 22 and 29. I don't think it will take very long.

MR. MATTHEWS: You may put him on. We will both cooperate with each other in accommodating witnesses.

THE COURT: All right. If you agree to it I will go along.

MR. DOBBINS: Thank you very much.

(Luncheon recess taken until 2:15 p.m.)

AFTERNOON SESSION

2:15 p.m.

B37 MR. DOBBINS: May I put Mr. Vickers on the stand?

THE COURT: Sure.

G E O R G E H. V I C K E R S, called as a witness on behalf of cross-claimants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Mr. Vickers, where do you reside?

A 575 Nancy Road, Ardley, Pennsylvania.

Q What is your occupation or profession?

A I am a CPA.

Q How long have you been a CPA?

A Since 1959.

Q In 1959 by whom were you employed?

A I was employed by Fernold & Company.

Q What are they?

A A CPA firm.

Q How long were you in that capacity with Fernold?

A At this point in time I was a senior accountant.

Q How long did you remain with Fernold?

A Fernold & Company merged with Main Lafrentz in about 1962 and I was with the firm after the merger until 1967.

Q In other words, Main Lafrentz took on Fernold in 1962 and you remained with the successor accounting firm until February 1967?

A Yes, sir.

Q Directing your attention to February 1967 and immediately prior, January 1967, what was your position with Main Lafrentz?

A I was a principal accountant.

Q What is a principal accountant?

A It is a situation within the company between manager and partner.

Q Prior to February 1967, in your capacity as auditor I take it you were doing regular auditing, outside auditing for Main Lafrentz?

A Yes.

Q In your capacity as outside auditor did you have occasion to do any work for Modern Talking Picture Service, Inc.?

A Yes.

Q When did you start?

A Approximately in 1955 until 1967.

Q What work did you do? Will you briefly tell the

Court?

A In 1967 I was principal in charge of auditing. Prior to that I had been a junior and a manager on the job.

Q Then in 1967 you were in charge of the audit?

A Yes.

Q In February 1967 what did you do?

A I left Main Lafrentz and joined Modern Talking Picture Service as secretary-treasurer.

Q What were your responsibilities as secretary-treasurer?

A As treasurer I was responsible for all financial matters. As secretary, I was responsible for recording the minutes of the Board of Directors and functioning in the capacity as directed by the Board of Directors.

Q Are you still with Modern Talking Picture?

A No, I am not.

Q When did you leave?

A I left in January of 1969.

Q Did you go with some other firm?

A Yes, Continental Grain.

Q What did you do at Continental Grain?

A I was the domestic controller responsible for North American operations.

Q Are you still with them now?

A No, I am not.

Q When did you leave them?

A In September of 1973.

Q What do you do now?

A I am practicing on my own.

Q A practicing accountant?

A Yes.

Q Directing your attention to events occurring within Modern Talking Picture in March and April of 1968, make it March, April and May of 1968, did you eventually become aware of two separate offers by Sonderling -- withdrawn.

I am showing you what has been marked as Cross-Claimants' Exhibit 11 which purports to be the letter addressed to the Board of Directors of Modern Talking Picture from the Sonderling Corporation dated March 20, 1968.

Did you have occasion sometime during that period, March, April and May, to see that letter or a copy thereof?

A Bear with me for one minute.

Q Sure.

A I saw this letter approximately, I would say, the third week in April of 1968.

Q You note it contains two alternatives, one a proposal to acquire all stock and, two, a proposal to acquire all the assets with a 50 percent reserve clause set up to be

payable sometime, as I recall, in 1969.

A No, sir, may I interrupt? There is no proviso for a 50 percent reserve. It is simply an offer to purchase either the stock or the assets of the company for $2,800,000.

Q I am sorry.

MR. MATTHEWS: Will the witness speak a little louder?

(Answer read)

Q Let me show you what has been marked as Plaintiff's Exhibit 21 which purports to be the minutes of a special meeting of the Board of Directors held April 8, 1968.

Were you present at that directors meeting on April 8, 1968?

A Yes, I was.

Q Was an asset deal discussed on that date, acquisition of the company by Sonderling?

A A proposal was made to sell the company to Sonderling or to sell the assets of the company to Sonderling at that meeting.

Q Could you briefly describe the terms of the proposal?

A The terms were $2,800,000 of which $300,000 was to be paid to a firm in Philadelphia, of which Sidney Pepper was to receive $100,000 of that $300,000.

Fifty percent was to be paid sometime prior to May 15,

1968 and the balance was to be paid after January 1st, 1969.

Q Taking that offer as you have described it as proposed at the Board of Directors meeting on April 8, 1968, and taking that and comparing with an offer to purchase all of the common stock of the company for $2,800,000 in cash, did you in your capacity as treasurer and chief financial man for the company have an opinion back in April 1968 as to which of these proposals, i.e., either the stock or the asset deal with a 50 percent reserve or 50 percent payoff in 1968, as to which of those proposals was more favorable toward the selling shareholders of the company?

A In my opinion it was to the advantage of the shareholders to sell the stock and not the assets.

Q Could you briefly tell the Court the reason for that opinion?

A My first concern was the fact that there would possibly be a problem with respect to the recapture of depreciation.

There would also be a problem of contingent liabilities. Further, there would be a problem with regard to certain contracts that we had of MLA.

Q What is that?

A A division of Modern Talking Picture Service and the full name is Modern Learning Aid, that distributed and

sold educational films and visual materials.

I was concerned that we were breaking the contracts under which we operated with these firms.

Q With what firms?

A Colleges and other educational institutions that developed programs that we sold. It was their copyrighting materials that we were either selling or leasing to various schools and educational institutions throughout the United States and abroad.

Q Would you explain to the Court why an asset deal would complicate those particular contracts?

A Because their original contracts were with Modern Talking Picture Service and they were not transferrable as I recall.

Q Roughly how many contracts were involved there?

A I would have to guess; approximately 20 to 25.

Q Approximately how much revenue would they generate over the course of a year?

A Again I would have to guess; approximately two and a half to three million dollars.

B38 Q Going to this recapture of depreciation, could you explain to the Court what this means, the significance of it?

A That is a section of the Code, the IRS Code.

Q First of all what assets are you talking about?

A We are talking about primarily educational films that we had purchased and were leasing to customers.

Q Yes.

A The cost of those films at that point in time was approximately a million dollars.

Q That is the cost as depreciated?

A No, total cost. In addition to that we had certain other properties such as office furniture and fixtures and certain equipment for maintaining the quality of the films.

The IRS Code concerns itself with the sale of assets -- let me see -- in that if an asset is sold at that point in time, if it was sold subsequent to 1961 as I recall, then if the selling price was in excess of the depreciated value of that asset, then the seller of that asset could be subject to ordinary income for the difference between the selling price and the net book value of that asset.

Q In other words, if the net book value was below the selling price of the asset, they would be subjected to or taxed as ordinary income rather than capital gains?

A Yes.

Q Were there any assets -- first of all were there any assets that in fact in April of 1968 were carried on

the books below their fair market value?

A Below their fair market value? I never actually tried to determine their fair market value but the Sonderling offer was for two and a half million and the book value of the assets net of liabilities of Modern Talking Picture Service was one million five hundred thousand so they were offering to pay us one million dollars in excess of the net value of those assets so in that regard they were greater than the market value.

Q Were there any assets which in your opinion were in fact carried as they were depreciated and could be explained as less than below fair market value?

A Yes.

Q What were those?

A The educational films in particular.

Q I realize that there was no claim made by IRS but what were the parameters of the possible claim there?

A To the best of my recollection, about a half million dollars.

Q So there would be -- in other words that half million dollars would be taxed as ordinary income as opposed to capital gains rates?

A Yes.

Q That is if the sale of assets had been consummated?

A Yes.

Q Either on April 8 or prior to April 8th had you had any talks with Mr. Pepper concerning the feasibility of going either the asset route or the stock route? Did you discuss this question of recapture of depreciation with him at all?

A I can't recall a specific instance where I discussed it with Mr. Pepper, but I had discussions with both management and shareholders as well as members of the Board of Directors in general. I can't imagine why I would have excluded Mr. Pepper.

Q Either on April 8 or prior thereto were you aware that the Sonderling offer had in fact offered as one alternative a purchase of all of the outstanding stock?

A Prior to April 8th?

Q Yes, prior to and including April 8th?

A No.

Q Going back to this recapture of depreciation for a minute, once the purchaser of these assets acquired them, could he write them up or did he have to take them at the basis of the --

A No, he can write them up. He can increase the value of the assets for tax purposes.

Q And carries it as his cost?

A Right.

Q And continues the depreciation from that basis?

A Yes.

Q So would it have been more favorable to acquire or to go the asset route?

A From their point of view, yes.

Q You testified, as I recall, that you saw this letter from Sonderling dated March 22, Exhibit 11 in Evidence, as best you can recall in the third week of April?

A May I interrupt? The letter that we discussed was a March 20 letter to the Board of Directors.

Q Yes, that is right. That one is in front of you marked Exhibit 11.

A Yes.

Q Prior to that time had you been aware that Sonderling had made a stock offer?

A No, sir.

Q You were in contact I take it, daily contact, with the operating executives of the company, were you not?

A Yes, sir.

Q Did they communicate to you in words or in substance that they were aware that Sonderling had made a stock offer?

A No, sir.

Q Prior to this time?

A No, sir.

Q There was some testimony yesterday to the effect that 50 percent reserve for contingent liabilities, going the asset route had advantageous tax consequences to the sellers.

Could you tell the Court what tax consequences this deferral of 50 percent of the purchase price less contingent liabilities until 1969 would have had?

MR. MATTHEWS: I think this is speculating and arguing on the law and I don't think it enlightens anybody. That should be covered by briefs if it is relevant and material.

THE COURT: What facts do you expect to elicit here?

MR. DOBBINS: While it is law, it is also fact. We are dealing with law as facts as to what was disclosed or not disclosed to the stockholders and Mr. Pepper yesterday volunteered not in response to any question of mine but volunteered the fact that this asset route in his opinion had advantageous tax consequences to the selling stockholders. That is the sole reason I am going into it. I won't go into it if your Honor doesn't --

THE COURT: I would just as soon you went on to something else and you can argue about that.

MR. DOBBINS: All right.

Q Were you present at a meeting on April 5 at which Mr. Oard and Mr. Eberle participated in a discussion concerning a proposed sale by Sonderling?

A I was at a meeting that would have included Mr. Lenz, Mr. Oard, Mr. Eberle, Mrs. Arlinghaus and Mr. Pepper and -- talking about April 5?

Q Yes, April 5.

A And Mr. Sonderling.

Q Where was this meeting?

A In the office of Mr. Lenz.

Q At --

A Modern Talking Picture Service.

Q Well, was this letter, Exhibit 11 shown then?

A No.

Q Was there any discussion about the purchase price that Sonderling was paying?

A There was a question raised by Mr. Oard.

Q Who is Mr. Oard?

A Mr. Oard was a vice-president of Modern at that time and also a member of the Board of Directors.

Q Yes?

A He asked Mr. Sonderling what he proposed to pay for the company.

Q Yes?

A Mr. Sonderling did not respond and, as I recall, Sidney Pepper's words, they were something like "That is none of your business."

Q Mr. Oard's business?

A Yes, sir.

Q Was the purchase price discussed in terms of purchase, discussed any further at that meeting?

A No, sir.

Q Turning to the April 8th Board of Directors meeting, I take it it was one of your duties as secretary to record the minutes of the Board of Directors?

A Yes, sir.

Q Would you briefly describe the routine that you follows?

A Under normal circumstances as the meeting progressed I made notes. At the end of the meeting or after the meeting I submitted those notes to Mr. Pepper where then he transcribed them, returned it to me and I signed them and returned them to Mr. Pepper and he distributed them to the Board of Directors.

Q Was that procedure followed at this April 8th meeting?

A No, sir.

B39 Q Would you describe first of all how you recorded

the various resolutions at that meeting on April 8?

A At that particular meeting I asked Mr. Pepper to repeat the resolutions that he made so I could transcribe them in longhand.

Q Why did you do that?

A The resolutions that he was making were quite controversial and I wanted to make sure that I had exactly the resolution that he proposed at that meeting and on which they had voted.

Q You proposed to transcribe them in longhand?

A I did. I read them back at the meeting of the Board.

Q Before the votes were taken?

A I don't recall whether before or after, sir.

Q But you read them to the Board?

A Yes.

Q As you had recorded them in longhand?

A Exactly.

Q Subsequently did you have those resolutions typed up?

A Yes, I forwarded them to Sidney Pepper and he typed the minutes of that meeting.

Q Skipping for a moment to the Delaware Chancery hearing on May 13, were you present at that hearing?

A Yes, I was.

Q Did you give evidence at that hearing?

A Yes, I did.

Q Were you present when Mr. C[illegible]d testified?

A Yes, I was.

Q Directing your attention to page 30 of the transcript in the Delaware Chancery hearing on the preliminary injunction, which is Mr. Oard's direct examination but beginning on page 29, he starts to answer "Mr. Pepper proposed the following resolution" and going on to -- which starts in the middle of page 30 and going on roughly to the middle of page 31.

A Yes.

Q First of all, were you present in court when Mr. Oard read that resolution No.2, is that correct?

A Yes, I was.

Q Was this an accurate reading of the resolution as you transcribed it?

A Yes.

Q After you sent the specific -- I have reference to the last few minutes where it says that Sidney Pepper, counsel and director for the corporation is to make no charge to the corporation for services herewith but is to receive $100,000 commission from the Commonwealth Development

Corporation, was that how the resolution was proposed to the Board of Directors?

A That was Sidney's resolution.

Q Did you send this resolution No.2 along with the other resolutions? I believe you testified you did send it to Mr. Pepper.

A Yes.

Q Then what happened?

A Approximately May 3rd Mr. Pepper asked me to come to his office in order to sign the minutes of that meeting of April 8th.

Q Yes.

A He presented me with minutes of a meeting dated April 8th which I found to be different than what I had transcribed of that meeting of April 8th in a number of different regards and I refused to sign those minutes.

Q Can you give us some of the regards in which they differed?

Q With respect to the Wilmington meeting -- I mean it started with the resolution No.2, the thing that I remember particularly was that the word "charges" in the last sentence of resolution No.2 was changed. There were other changes made but I thought that was quite significant.

Q Why was that significant?

A Because it changes the contents of the thought entirely.

In addition to that, resolution No.7 authorized the signing of checks by Mr. Pepper and Mr. Cox after the company assets had been sold to Sonderling Broadcasting Company and in the minutes presented to me, the resolution stated that they could sign checks immediately.

There was also a resolution, and I can't see it here right now, wherein if any changes were to be made or any charges were to be made against the reserve account, it had to be approved by Mr. Eberle and Mr. Cox in the original resolution.

The resolution presented to me was to be Mr. Eberle or Mr. Cox and finally --

Q Just a minute. Could you tell the Court who Mr. Cox is?

A Mr. Cox was an associate of Mr. Pepper's at DeWitt, Pepper & Howell and also a member of the Board of Directors of Modern.

Finally, in the minutes he presented to me that day, there was a resolution to dissolve the profit sharing plan of Modern which had not even been proposed at the Board of Directors meeting of April 8th.

Q There was no discussion about the profit sharing

plan on April 8th?

A No.

Q Incidentally, are those minutes, purported minutes marked as Exhibit 21, are those the minutes that Mr. Pepper exhibited to you at his office on May 3rd?

A I have not had a chance to read them thoroughly but they don't appear to be the same minutes, no.

Q In othe words, based on your examination before the hearing this is a different set of minutes than the ones presented to you on May 3rd?

A Yes, sir.

Q Is it the same minutes that you transcribed on April 8th?

A No.

Q When for the first time in May did you see Mrs. Arlinghaus?

A May of 1968?

Q Yes, May 1968.

A May 17.

Q What was the occasion for your seeing her?

A Mrs. Arlinghaus returned from a cruise that day.

Q Where did you meet her?

A I met her when the boat docked at the dock.

Q Who else was there besides yourself, connected

with Modern?

A There was Mr. Oard who I mentioned before, an officer and director of the corporation. Mr. Hough also an officer of the corporation, myself, the daughter of Mrs. Arlinghaus as well as Mr. Sidney Pepper.

Q Did you subsequent to the time Mrs. Arlinghaus landed on Friday, May 17 and prior to Tuesday, May 21, did you have a discussion with her regarding the desirability or lack of desirability of her obtaining her stock certificates in Modern Talking Picture?

A Yes, I suggested to her that she should get her stock certificates without them being held by Mr. Pepper as quickly as possible.

Q What was done on that suggestion?

A Mrs. Arlinghaus had a letter prepared authorizing me to pick up those certificates from Mr. Pepper at his office on May 21, I believe.

Q Did you go to Mr. Pepper's office on May 21?

A Yes.

Q This was down at 120 Broadway?

A Yes.

Q Would you relate the substance of your conversation with him on that day, May 21?

A I conveyed to Mr. Pepper Mrs. Arlinghaus' desire

to receive her certificates as well as the certificates of the Estate and the Custodianship for each of the children and presented him with a letter she had given me in order to authorize my acceptance of these certificates.

In addition, I also requested him to return to me all records of the corporation that he was holding for the corporation.

Q What did he say in response?

A I can't recall specifically the details of what he said but one thing I do remember, he said in order to get those records and documents, they were not in his office and he would have to go out and pick them up.

Q Did he leave you or what?

A Yes, he left for approximately an hour.

Q Then what happened? I take it he came back?

A Yes. When he returned he told me that he did not intend to give me the certificates or the records of the corporation.

Q The following day did you also attend a meeting at Mr. Pepper's office? That is, May 22?

A Yes.

B40 Q Who was in attendance at that meeting?

A Mrs. Arlinghaus, Mr. Oard, myself, Mr. Kelly and I believe Mr. Jensen.

Q And Mr. Pepper?

A And Mr. Pepper, I beg your pardon.

Q Was there a stenographer present?

A No.

Q Did you see anyone taking stenographic notes?

A No one in that room was taking notes.

Q Can you relate as best you can recall the substance of that meeting?

A Mr. Kelly informed Mr. Pepper he now represented Mrs. Arlinghaus in her personal and in her various fiduciary responsibilities.

He again repeated the request to turn over the certificates to Mrs. Arlinghaus that were being held by Mr. Pepper. He requested that Mr. Pepper turn over to him the documents of Modern Talking Picture Service being held by Mr. Pepper.

Q What did Mr. Pepper have to say?

A Mr. Pepper said he did not intend to return those documents to us, that someone owed him money and he expected to be paid a certain sum of money.

Q Do you recall the sum?

A $110,000 including expenses.

Q Was there any discussion about a bond at this time?

A Yes, sir.

Q Would you relate that?

A Mr. Kelly proposed to Mr. Pepper that as substitute collateral for the certificates and records that we would provide him with a bond in the amount of $110,000.

Q What did Mr. Pepper have to say?

A He agreed.

Q Did you subsequent to May 22 have another occasion to visit Mr. Pepper at his office?

A Yes, on May 29.

Q I am showing you what has been marked as Cross-Claimants' Exhibit 3 in Evidence. I ask you if you have ever seen the original or a copy of that document which purports to be a bond from Globe Indemnity for $110,000?

A Yes, sir.

Q Could you relate when you first saw it and the circumstances?

A I believe it was on May 28 I purchased this bond.

Q You personally?

A Yes.

Q Purchased the bond?

A Yes.

Q At Globe?

A At Globe.

Q What did you do with it?

A Together with Mr. Jensen I returned to Sidney's

office and presented the bond to Mr. Pepper and requested at that point in time he return the certificates and records of the corporation.

Q What did Mr. Pepper say?

A He refused to accept the bond and also refused to return the certificates and records of the corporation.

MR. DOBBINS: I have no further questions.

CROSS-EXAMINATION

BY MR. MATTHEWS:

Q Mr. Vickers, you knew, did you not, that the bond only covered Modern Talking Pictures and did not cover the stockholders?

A Sir, the conversation had between Mr. [illegible] and Mr. Pepper concerned both the records of the corporation as the certificates being held by Mr. Pepper for Mrs. Arlinghaus and her children.

Q But you notice that the bond did not provide that it protected him, only conditioned upon a judgment may be returned against Modern and nothing about the stockholders?

A It is entirely possible. I haven't reviewed this thoroughly since that day six years ago.

Q On May 21 you presented a letter to Mr. Pepper from Mrs. Arlinghaus?

A Yes.

Q Authorizing you to pick up some papers?

A Certificates, stock certificates.

Q And other papers?

A There may have been other papers involved too, yes.

Q I show you this document which was marked Exhibit 2-A for Identification from Mrs. Arlinghaus to Mr. Pepper which you presented to Mr. Pepper.

A Yes, that appears to be the letter.

Q On the back of that letter you endorsed a receipt for certain tax returns and an original letter from Mr. Silverberg, 5/11/68 and annexed to it also was a receipt dated May 21, 1968 purportedly signed by you. Is this your signature?

A Yes, that is my signature.

Q All of the material referred to on the letter in longhand and the typewritten list with your signature at the foot, you received from Mr. Pepper on that occasion, yes or no?

A May I read it over?

Q Yes, sorry.

A I don't remember precisely but I would assume I did pick them up, yes.

Q Is that your handwriting on the back of the letter?

A Yes, it is.

Q Is this your signature?

A Yes.

Q On the foot of the typewritten page?

A Yes.

Q May 21, 1968?

A Yes.

Q You presume that you did pick them up?

A Yes.

MR. MATTHEWS: I offer this in evidence.

MR. DOBBINS: No objection.

xx (Defendant's Exhibit A-2 received in Evidence)

Q Mr. Vickers, I show you Exhibit 11 for Identification, a letter to the directors of Modern dated March 20, 1968 from Mr. Sonderling.

Do you recall ever seeing a copy of that letter?

A I have already testified to the fact that I did see a copy of this letter.

Q When did you first see it?

A As I said, approximately the third week in April of 1968.

Q Not before that?

A Not before then, no, sir.

Q I show you a letter signed by you dated May 1, 1968

to Mr. Pepper. I ask you if you recall writing that letter?

A Yes, I remember it, sir. It is my letter.

Q It is your letter and encloses a letter from Mr. Cahners?

A Yes.

Q It is a letter dated April 26 on Cahners Publishing Company letterhead signed by Mr. Hartman and addressed to Mr. Vickers, Secretary, Modern Talking Picture Service, Inc.

MR. MATTHEWS: I offer the letter and enclosures in evidence, Exhibit YY.

MR. DOBBINS: No objection.

xx (Defendant's Exhibit YY received in Evidence)

Q Were you present at a directors meeting in Rumson, New Jersey at Mrs. Arlinghaus' home following the date of this letter, on May 1?

A Subsequent to that day, yes, there was a Board of Directors meeting held in her home in Rumson, New Jersey and I was there, yes.

Q Do you have with your or available copies of the minutes of that meeting?

A No, I do not, sir.

Q Do you recall Mr. Cahners and two of his associates being present at Mrs. Arlinghaus' home?

A I recall Mr. Cahners being there and talking to

the Board of Directors, yes.

Q Did you record the incident in the minutes?

A I would assume so, yes.

Q You don't have a copy of the minutes?

A No, I don't have a copy of those minutes.

MR. MATTHEWS: I call your attention to the fact that this letter to Mr. Vickers by Cahners Publishing Company, asking him to bring to the attention of the Board of Directors their desire to acquire all the outstanding stock of Modern and Cahners is prepared to offer a price of $3,000,000 in cash for all of this stock, provided that satisfactory employment arrangements can be made with the company management, subject to further considerations and business and financial provisions.

Q I show you what purports to be a copy of the minutes of that meeting held on May 24, 1968 at the residence of Mrs. Arlinghaus. I ask you if that is a correct copy?

A Yes, sir.

MR. MATTHEWS: I offer in evidence Exhibit 000 for Identification.

Q Mr. Vickers, are these the minutes of the meeting or --

A I don't know what terminology you use but this is the only recording of that meeting. I don't know how

you use the terminology of minutes or proceedings but I think that is the only recording of that meeting.

MR.DOBBINS: With all due respect to Mr. Matthews, the minutes have corrections but these are the minutes supposedly kept by the person in the corporation assigned to keep them. This includes a transcript of the minutes by a Certified Court Reporter to which I have no objection.

THE COURT: You have no objection? All right.

xx (Defendant's Exhibit OOO for Identification received in Evidence)

B41 Q Were there other minutes which you prepared as secretary?

A For that particular meeting?

Q Yes.

A I don't believe so. Although I am not positive.

Q You said your notes of the meeting of May 8th differed from those Mr. Pepper prepared?

A April 8th, sir, yes, they were different.

Q They were different?

A Yes.

Q Do you have the original notes?

A No, I do not, sir.

Q Are they extant do you know that?

A I don't have the vaguest idea where they would be

at this time.

Q Did you ever write up minutes for this meeting of April 8th?

A Yes.

Q Do you have a copy?

A No.

MR. MATTHEWS: Does counsel for the cross-claimants have a copy?

MR. DOBBINS: No. I would think they were introduced in evidence down in Delaware and we tried to get the exhibits back from counsel down there but like all closed cases, exhibits have a way of being lost and they returned the exhibits to us from the Delaware Chancery meeting and have never been able to retrieve those.

Q You testified that twenty or twenty-five contracts could not be assigned and there was a question if a sale went the asset route there would be a great tax problem instead of capital gains, the purchaser might be stuck with ordinary income. Did you discuss that with Mrs. Arlinghaus?

A Yes.

Q What was her reaction?

A With respect to the Sonderling sale or with respect to the conversation that I had with her in the past about these problems?

Q Both.

A With respect to the Sonderling sale, I never had an opportunity to discuss it again with her.

Prior to that I was discussing with her strictly for information purposes so there was no shock or any problems along those lines.

Q Did she seem to understand it?

A I explained it to her two or three times and I think she understood it at that time.

Q Did you discuss it with her in the presence of Mr. Clem Arlinghaus?

A I can't recall ever discussing it with the two of them specifically, no, sir.

Q You knew that she leaned rather heavily on friends and associates, particularly Mr. Clem Arlinghaus, Mr. Newton, Charlie Newton?

A Yes, sir. With respect to Mr. Arlinghaus, she had discharged Mr. Arlinghaus from the Board of Directors in January of 1968 so there was no -- Mrs. Arlinghaus as shareholder of Modern Talking Picture Serivce had discharged Mr. Arlinghaus as a member of the Board of Directors in January 1968 so there was no reason for me to discuss it with Mr. Arlinghaus in April.

Q You say Mrs. Arlinghaus dismissed him from the

Board of Directors?

A Well, he had been dismissed or replaced on the Board of Directors, yes, sir.

MR. MATTHEWS: That is all I have.

REDIRECT EXAMINATION

BY MR. DOBBINS:

Q First of all, turning to the bond which is marked as Cross-Claimants' Exhibit 3 --

A Yes, sir.

Q When you presented this bond on May 29 to Mr. Pepper, did he say in words or in substance that the reason for rejecting the bond was that it was running only from the corporation and not the corporation jointly or severally with the various individual shareholders?

A I do not remember him making that claim in that regard, sir.

Q Did he specifiy to your recollection any reason for rejecting the bond?

A None.

Q Going back for a minute to your discussion that you and he had on May 3 when you were at his office, up there to sign and looking over the minutes of this April 8th, 1968 Board of Directors meeting, what if anything did Mr. Pepper say to you after you refused to sign the minutes?

A Probably the most personally significant thing he had to say was the fact that if I did not sign and continued to be an obstructionist, he would see to it that I was dismissed as treasurer of the corporation.

Q Were you present at a Board meeting on Friday, March 22 of the corporation, that is, of Modern?

A Yes, sir.

Q Was the Sonderling offer, any part of the Sonderling offer, either stock or cash, stock or acquisition of assets, put before the Board at this meeting on March 22?

A No, it was not.

MR. DOBBINS: I have no further questions.

RECROSS-EXAMINATION

BY MR. MATTHEWS:

Q Did you know Mr. Unger?

A Yes, sir.

Q Did you buy any stock from him after he closed title to the stock?

A No, sir.

Q You own some stock, don't you?

A No, never, no, sir.

Q Never owned any?

A Never owned any stock.

Q When did you first come to know Mr. Unger?

S I D N E Y P E P P E R, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. MATTHEWS:

Q Did you know of any follow-up on the Cahner proposal following the meeting at Rumson?

A No.

Q In the proceeding in Delaware I think you said while you were there you were not represented by an attorney, you were just called as a witness?

A That is correct.

Q Why was the Delaware injunction granted?

MR. DOBBINS: I object to that.

THE COURT: Sustained.

Q Can you tell us how many prospective purchasers were referred to you or in connection with which you performed any legal services? Have you got a list of them here?

A I think it is one of the exhibits.

Q I show you Exhibit FFFF and ask if that contains a list of some of those who were referred to you by Mr. Lenz or others in the Modern corporation?

A It does.

MR. MATTHEWS: I offer that in evidence.

MR. DOBBINS: I would like a voir dire on this if I may, your Honor.

VOIR DIRE EXAMINATION

BY MR. DOBBINS:

Q Mr. Pepper, Mr. Matthews asked you if that is a list of the corporations in which you conducted or for which you performed legal services. Now, the exhibit starts off, paragraph 1 of the exhibit starts off "Services performed by Sidney Pepper in connection with his efforts to obtain an appropriate deal for the disposition of the capital stock or assets of Modern Talking Picture Service, Inc."

I take it that this list first of all -- did you prepare this list of companies?

A I think you have not read this first paragraph or my past testimony correctly. I remember it varied from the way you put it.

Q Would you read the first paragraph?

A But you stated on the record differently from the way Mr. Matthews presented it to me.

Q I understand that. I am reading from paragraph 1 of the document which I take it you prepared, did you not?

A Mr. Matthews and I jointly prepared it.

Q The first paragraph describes the services in connection with your efforts to obtain an appropriate deal for the disposition of the capital stock or assets of Modern Talking Picture Service, Inc.

My question is does that list appended to the back refer to your efforts to obtain an appropriate deal for the disposition of the capital stock or assets of Modern Talking Picture Service, Inc. or does it refer to legal services, which is my understanding of the offer? What is it being offered for?

MR. MATTHEWS: I can't see that there is any difference between the two alternatives because it is legal services that he rendered in checking out the acceptability of prospective buyers.

THE COURT: Well, he was asked when he prepared this exhibit with you. When was that, Mr. Pepper?

THE WITNESS: It is stated that this copy was delivered on October 12, 1972 to Mr. Jensen. The document is undated and I assume it was prepared just before October 12, 1972.

THE COURT: So we can get through with this disagreement, let me ask you to describe the nature of the legal services you performed in connection with those companies?

THE WITNESS: I studied the various companies, most of them were offering stock and it was a device to give us paper for our going business. I didn't think it was desirable to take their papers.

THE COURT: Just tell me what you did.

THE WITNESS: I studied the financial reports of these companies, their documentation with reference to the stock so I would understand it.

I got further particulars as to how they really intended to implement their offers.

Then I checked from various sources the strength of the companies and what they could do for our company and its stockholders; whether they would be the kind of companies that would be good for Mrs. Arlinghaus and the others to invest in.

I had taken it up with the key employees of Modern to see if the proposed acquiring corporations would be acceptable to them for continued employment.

There were some that they didn't wish to be associated with. That eliminated them because unless we could deliver to the purchaser a going organization, we would have no hope of consummating any deal, in my opinion.

There were tax problems like, for example, the last one, Sonderling wanted a pooling of earnings method and so did Fuqua.

I don't think we got far enough with the others to get into their tax problems and the other included General Electric, Wometco, Metro-Goldwyn-Mayer, Warner's I didn't

like.

We had had some experience with the motion picture industry. We had represented a good many of these companies in earlier years. We got in this through Joseph P. Kennedy --

THE COURT: Just stick to the question if you will.

B43 THE WITNESS: Cahners I thought would be wonderful. KMS to me was a paper conglomerate. Everybody was willing to furnish us with paper and it was a serious question as to how good the paper would be. Bangor-Punta is another corporation which unfortunately I am a shareholder and was also very generous with their paper offering but fortunately we didn't go into that.

BY MR. DOBBINS:

Q Did you have some source to prepare this list from or was this prepared by memory back in October 1972?

A This list?

Q Yes.

A Prepared by me from memoranda that I had accumulated over a couple of years.

Q In other words, you got all your memoranda together and accumulated those?

A Yes, sir.

Q Were those memoranda produced?

there of Mr. Pepper, that he did not turn this letter over to the Board of Directors.

MR. DOBBINS: I don't think there is a dispute that he turned the letter over both to Mr. Eberle and Mrs. Arlinghaus as this comes from Mrs. Arlinghaus' files. No one ever contested that point to the contrary.

THE COURT: You don't think there is any dispute what?

MR. DOBBINS: That Mr. Pepper turned over the March 20 letter to Mrs. Arlinghaus and Mr. Eberle. The point is who turned it over to management of Modern or to the other Board members.

MR. MATTHEWS: The testimony is that he received a copy of this letter by mail.

MR. DOBBINS: There is no dispute that this is Mrs. Arlinghaus' own original letter that Mr. Pepper is now offering. I have no objection to it being offered.

THE COURT: Let us receive it. I thought it was already in evidence.

MR. DOBBINS: This is Mrs. Arlinghaus' copy, the one sent to her. Obviously the changes weren't on this when it was sent.

MR. MATTHEWS: I have indicated the change.

THE COURT: Put it in evidence.

xx (Defendant's Exhibit HHHH for Identification received in Evidence)

BY MR. MATTHEWS:

Q I think you testified, Mr. Pepper, in addition to a copy of this letter being delivered to you by Mr. Weil, you got another copy in the mail?

A Mr. Matthews, I would like if I may have the opportunity, I can clarify it very quickly. May I have the exhibits?

THE WITNESS: If your Honor please, the original letter, Sonderling letter had embossed Sonderling Broadcasting Corporation Logo in the upper right-hand corner. None of these seem to have it.

One of these letters with delineations through it was produced by Mrs. Arlinghaus at an examination before trial conducted by Mr. Rosen. I think it was produced by Mr. Jensen and the variations in typing and in stationery and in various aspects. That one copy I did not see until the examination before trial.

Mr. Weil, the so-called broker, gave me one on March 22, 1968 which I exhibited to Mrs. Arlinghaus and Mr. Eberle and got their approval to the acceptance of the offer contained therein for their 70 percent stock interest.

Subsequently, additional copies came to me by

special delivery from Sonderling, addressed to me at my office.

Now, I was questioned whether I had shown one of these copies of the Board of Directors. Some of them were clearly Xerox copies. Actually, I didn't show any of them to the Board of Directors as a Board. I showed them to most of the individuals as individuals.

I felt I was inhibited from showing it to the Board of Directors by reason the IRS Code, Section 337 but all of them either saw it directly from me or indicated in conversations they were familiar with it. That extended to even the junior officers.

B44 We had a meeting with Sonderling and the junior officers, including also Mr. Lenz and Mr. Oard, executive president and vice-president. Here a stranger comes into their office and asks a lot of details about the business. It is inconceivable that these people who open up to a stranger without knowing what his objective was.

MR. DOBBINS: This is not responsive and I object.

THE COURT: Well, I have in mind Mr. Pepper is a lawyer and we have to contend with our failings as well as our virtues but I wish you would confine yourself to testifying, Mr. Pepper.

THE WITNESS: I told him if they had not seen

the Sonderling letter of March 20, 1968, I assumed all of you have seen it. There was no dissent. I said if they hadn't seen it I will show it to them or read it to them and I so testified. Nobody asked me.

The meeting went on as if everybody was fully acquainted with it. It is hard to believe that these people should let their private affairs be exposed to possibly competitors without wondering what was going on.

Now, Mr. Oard according to Vickers attributed a statement to me that it was none of his business. To the best of my recollection it was Mr. Eberle who said that it was none of his business as to what the stockholders were getting for that. I wouldn't talk that way to Mr. Oard. In fact, I don't talk that way to people.

Now, this confusion of my statement that I didn't show one of these four copies to the Board of Directors has been blown up or seized upon as an act of disloyalty. I explained this all to the Circuit Court of Appeals.

BY MR. MATTHEWS:

Q You have now added an explanation that you made initially to me and so testified that Mr. Weil who gave you a copy of this letter told you he was also general counsel to the directors or one of them?

A Yes, on March 22 he said he was proceeding to the

company office from the Hotel Americana where we had a meeting earlier that morning. He was going to deliver a copy of that to the president or vice-president of Modern who he theretofore met.

In his deposition or in his transcript of his conversation with Mr. Unger he so stated that he had done it.

MR. MATTHEWS: That is enough of that unless you have something further that needs to be added. I am sorry I made so much of it but so much was made of the letter heretofore that I thought I would clear it up once and for all.

THE COURT: We have about ten minutes more today. How much longer are you going to be with Mr. Pepper? Could we try to finish?

MR. MATTHEWS: I am afraid I couldn't today.

THE COURT: Let us use the ten minutes and see if we can get something more done.

MR. MATTHEWS: With the disorganization or my papers I would just probably be wasting the ten minutes.

THE COURT: All right, let us not waste it and let us meet at 10:00 o'clock tomorrow morning and I will ask you, Mr. Matthews if you can please repair this disorganization so that we could perhaps move along tomorrow with somewhat more faster pace than we have been following today. See you all in the morning.

(Adjournment taken until May 21, 1975 at 10:00 a.m.)

R O S A L I E M. A R L I N G H A U S, called as a witness on behalf of cross-claimants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Where do you reside, Mrs. Arlinghaus?

A Rumson, New Jersey, on Wind Mill Lane.

Q What is your marital status?

A Widow.

Q Who was your former husband?

A Frank H. Arlinghaus.

Q When did he die?

A August 24, 1964.

Q Following his death did you retain attorneys for the Estate?

A I beg your pardon?

Q Following Mr. Arlinghaus' death did you retain attorneys for the Estate, the Estate of your husband?

A The same firm, DeWitt, Pepper & Howell.

Q Who did most of the work for the Estate, at least in connection with you?

A Mr. Sidney Pepper.

Q Was he also your personal attorney?

A Yes.

Q How long did he continue to act as your attorney for the Estate and for yourself?

A Until May 21, 22, 1968.

Q Prior to that time did you have conversations with Mr. Pepper about the possible sale of stock that you held either in your capacity as Executrix, Custodian or individual capacity in Modern Talking Picture Service, Inc.?

A I don't recall.

Q What do you recall prior to May 1968 regarding talks with Mr. Pepper regarding the sale either of the company itself, the assets of the company or your stock and those of others?

A Mr. Pepper brought to my attention that there were interested parties in securing the company. I guess that would be the stock and so on and I directed him to bring all these to the attention of Mr. Carl Lenz who was president and I in turn when I received inquiries always directed them to Mr. Carl Lenz, president of Modern Talking Picture Service.

Q What was your reason for doing that?

A Well, Mr. Lenz was president of Modern and it seemed the proper thing to do, direct any inquiries to him.

Q Did you retain Mr. Pepper either individually or on behalf of the Estate to represent you in relation to and

the management group but Mr. Pepper recommended this as a possible purchase with advantages.

B55 Q What advantages, did he say?

A He didn't say.

Q Did he discuss with you alternatives, the sale of the assets as opposed to a sale of the stock?

A No, I don't recall.

Q That letter, Exhibit 12, after you signed it, did Mr. Pepper give you a copy of that?

A No, I don't believe he did.

Q In other words, you signed it and he took it?

A Yes.

Q Showing you Cross-Claimants' Exhibit 14, which is a consent dated April 8, 1968 -- I realize the Xerox is rather faint -- is that your signature down at the bottom?

A Yes.

Q When did you sign this, before or after the Board of Directors meeting held April 8th?

A Before the Board of Directors meeting I was persuaded to sign it. I remember distinctly signing it on top of some filing cabinets in the back of the office of Modern and directed to sign it by Mr. Pepper.

Q What was his conversation -- before the meeting?

A Yes.

A Yes.

Q Did he explain the contents of it to you at that time?

A No, he didn't. Just you are ready to sign and others signed it also.

Q What as nearly as you can recollect was the substance of the conversation with Mr. Pepper at that time that you signed it?

A I don't recall.

Q Did he give you a copy of that after you signed it?

A No.

Q What, as best you can recollect, transpired at the April 8th meeting?

A The meeting was called to order and Mr. Pepper took over the conversation and, as I recall, had some notes on a yellow tab paper and so on.

Then he said first of all that the company would be liquidated. This was a surprise, and we will have a new name.

Q You say surprise?

A I hadn't heard of any liquidation of the company. And then there would be a new name and then there would be, next I recall a finder's fee of $300,000, which was the first

Q A couple of days after this?

A Yes.

Q When did you return?

A I returned the 17th of May.

Q Had you heard from Mr. Pepper prior to the time that you docked?

A I had a ship to shore phone call from Mr. Pepper the day before the ship returned to New York in which he informed me there had been a suit in Delaware and the sale to Sonderling had been rejected -- is that the correct terminology?

THE COURT: Have you finished your answer?

THE WITNESS: Yes.

Q Have you given us as much as you can remember of that conversation with Mr. Pepper?

A Yes, I have.

Q Prior to that telephone conversation with Mr. Pepper the day before the ship landed, had you ever been contacted regarding representation at this Delaware hearing?

A No, I did not know anything about it.

Q Are you acquainted with a lawyer in Delaware by the name of Mr. Anderson?

A No.

Q David F. Anderson?

A No, I am not.

Q I take it you never authorized Mr. Anderson to appear for you at that hearing?

A No.

Q When you docked were you met by anyone when the ship landed? Were you met by anyone who had any connection with Modern Talking Picture Service?

A By Mr. Hough and, as I recall, Mr. Vickers and Mr. Oard and also my daughter.

Q How about Mr. Pepper, was he there?

A Yes, he was there.

Q What conversation did you have with these respective people?

A I don't recall the conversation with Mr. Pepper and words were certainly very short because Mr. Hough was there and he spoke to me and he told me they instituted a minority stockholders' suit to stop the sale of Sonderling, stock Sonderling from purchasing Modern.

Q After you landed on Friday, May 17 and up to May 20, did you have any conversations relating to obtaining your stock certificates back from Mr. Pepper?

A Yes. In May I was in Mr. Pepper's office and he was not there -- this was about Monday the 20th as I recall.

Q Did you go there with anybody?

A With Mr. Vickers, secretary-treasurer of Modern Talking Picture Service.

I asked for stock certificates and other pertinent pieces that he had belonging --

Q I thought you said that there was nobody there?

A He was not there. I spoke to him on the phone.

Q You did?

A Yes, and asked him, this is what I requested, and Mr. Vickers I believe was asking for some information and stock books and minutes of meetings of Modern.

Well, they weren't available and that was the last conversation I had with Mr. Pepper.

Q In the telephone conversation --

MR. MATTHEWS: May that last answer be read back to me?

(Answer read)

Q This is a telephone conversation?

A Yes.

Q Did he say in this telephone conversation why they weren't available, the stock certificates?

A They weren't in the office, as I recall.

B56 Q Subsequently, on or about May 22, did you go up to Mr. Pepper's office with any representatives of

Casey, Lane & Mittendorf?

A Yes.

Q I take it you had a conversation with him at that time when you went up?

A I said on the 20th, that phone conversation that day. Perhaps it wasn't reported but I said it.

Q I thought you said that was the last conversation?

A That day.

Q Did you see him on May 22?

A Yes.

Q Did you see him on May 21?

A No, Mr. Vickers went to the office with authorization of mine to secure what he was holding and he refused.

Q When you were at his office on May 22 was there any stenographer present taking notes of the meeting?

A No.

Q What as nearly as you can recall was said at that meeting -- first of all, who from Casey, Lane & Mittendorf went up with you?

A Mr. Kelly and Mr. Hagen and Mr. Jensen and Mr. Oard.

Q Oard from Modern?

A Yes, and myself. I don't recall whether Mr. Vickers was there that day.

WILLIAM E. KELLY, called as a witness on behalf of cross-claimants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Where do you reside, Mr. Kelly?

A 109 Washington Avenue, Spring Lake, New Jersey.

Q What is your position?

A I am an attorney admitted to practice in the State of New York.

Q How long have you been a member of the Bar?

A State of New York since 1956 and various Federal Courts, Supreme Court of the United States, on dates after that.

Q Are you associated with any firm?

A Casey, Lane & Mittendorf, 26 Broadway, New York, New York.

Q What is your position in that firm?

A Member of the firm.

Q How long have you been a member of the firm or associated with the firm?

A With the firm since I got out of law school in 1956.

Q Directing your attention to May 21, 1968, did

A Mr. Eberle perhaps.

Q All right.

A I only talked to him once on the phone so his name is a little vague at this point.

We were unable to get the stock certificates from Mr. Pepper. There was then discussed somewhat more actively than had been discussed in the past the possibility of selling the assets.

Q Who discussed this?

A I believe Mr. Unger had generally expressed at the outset a willingness to go that route and there was a draft agreement prepared. I believe it came from Mr. Unger early in the week of which June 7 occurred, perhaps arrived at the office on June 3rd or 4th in a draft form and one of my partners worked on it as part of the deal.

Q What was discussed about the feasibility or non-feasibility of going ahead on the asset route on June 7?

A I think by the time June 7 arrived it was pretty much too late to complete as against this background of Mr. Unger's offer expiring on the evening of June 7.

Q What did Mr. Unger have to say about his offer?

A He made it clear that he was paying more for the financing for this particular project and had given two extensions and after the present stockholders were ready to

pay, decided to pay $75,000 to Mr. Pepper, he finally took the position he wanted the deal closed as of that day and that was it.

Q Did he give any statement as to whether or not he would extend the tender offer beyond June 7?

A I don't think he put it in words he would not extend the tender offer. He made it clear that June 7 at suppertime was the end as far as he was concerned. He wasn't going to get engaged in anything, it had to be concluded by that time in any respect.

Q You mentioned a conversation you had with Mr. Eberle down in Florida. Can you relate the substance of that conversation?

A As I understood it from my conversation with Mr. Vickers and Mrs. Arlinghaus at Mr. Pepper's office, Mr. Pepper also had Mr. Eberle's certificates. The question came up as to whether we would not have to get him involved in any proceeding in order to get back his certificates.

Mrs. Arlinghaus called him from our conference room. I wasn't listening on the conversation but the story was that he was willing to become a plaintiff in the action so long as it didn't cost him any money and Mrs. Arlinghaus assured him it wouldn't.

So there wouldn't be any question, I got on the phone

very briefly and introduced myself and he introduced himself to me by telephone and said I was authorized to include him as a plaintiff in the action brought by Mrs. Arlinghaus and the corporation provided that others would be paying the legal fees in connection with it.

I reaffirmed what Mrs. Arlinghaus said and it would be an expense of hers and the corporation and he agreed to become a plaintiff.

Q And based on this representation he was listed as plaintiff?

A Yes.

MR. MATTHEWS: May I have the answer read back, I couldn't hear it

(Answer read)

Q I hand you what has been marked as Defendant's Exhibit A. Have you ever seen that document before?

A Yes, sir.

Q When was the first time you saw it?

A The afternoon of June 7.

Q Can you relate the circumstances under which you did see it for the first time the afternoon of June 7?

A Mr. Rosen who basically authored this agreement came to the office. There was a brief discussion about what Mr. Pepper wanted.

Q You had a brief discussion with Mr. Pepper?

A Very brief discussion. Mr. Unger also I believe was present.

Mr. Unger had part of the conversation but whatever it was, it was a very brief conversation and turned around the surrender of the books and records of the corporation and various stock certificates that I have alluded to in return for this $75,000.

Mr. Rosen then had the agreement typed up as I recall it and then it was executed.

Q In other words, it was typed up there at the Modern Picture?

A I don't recall whether it was typed up there or whether Mr. Rosen left the office. There was a fairly good size office with typewriters around and I note the corrections, maybe just the corrections were typed at the office and Mr. Rosen went away and came back. I really don't have a recollection but he took care of the typing of it with the exception of that correction and then presented it and it was signed.

Q He was the one who drafted the agreement, I take it?

A Yes.

Q Subsequent to it being signed that earlier

evening of June 7, what did you do?

A Subsequent to it being signed?

Q Yes.

A That was the end of it, we went home. I think Mr. Vickers then attended to the counting of the certificates and seeing that everything was appropriate for the completion of the tender offer and I place it as early evening, maybe even as late as 6:30 or 7:00 o'clock but that concluded the day's events and I drove home.

Q Did you have anything to do with Modern Talking Pictures over the weekend?

A No, not that I recall.

Q When if ever was the first time you were advised that the consenting shareholders wanted to bring suit to void the agreement, Defendant's Exhibit A?

A There were two steps in that. Early the following week there was a brief communication. I am not sure, I believe it was Mrs. Arlinghaus and Mr. Hagen of my office and Mr. Hagen told me that Mrs. Arlinghaus, perhaps others, desired to countermand the assignment they had given in connection with the instrument and the following day Mr. Arlinghaus I believe came to the office. I think the actual suit didn't occur for some weeks after that.

Q But following Mrs. Arlinghaus' visit the middle

of that week you took steps to countermand the assignment?

A Yes, I believe Mr. Hagen attended to whatever formalities were to notify people in Ohio about that.

MR. DOBBINS: I have no further questions

CROSS-EXAMINATION

BY MR. MATTHEWS:

Q Who introduced you to Mrs. Arlinghaus?

A Mr. Vickers. I met with Mr. Vickers the day before and Mrs.Arlinghaus the next day at our office.

Q Mrs. Arlinghaus testified that you had introduced her -- that Mr. Unger had introduced her to you.

MR. DOBBINS: She certainly didn't testify that way in court.

THE COURT: Don't tell what somebody else testified. Just ask a question.

B60 Q Did Mrs. Arlinghaus testify that Mr. Unger recommended you?

A Yes. I believe that was brought out by Mrs. Arlinghaus. That didn't surprise me, so Mr. Unger called me a day or two before that.

Q Was there a possible conflict of interest for you to represent Mr. Unger and Mrs. Arlinghaus?

A I never represented Mr. Unger. In fact, Mr. Unger had done some legal work in Ohio for corporate clients of

ours because we were general counsel for this other corporation. We never represented Mr. Unger.

Q Do you know whether he recommended to the officers of Modern that Modern retain you or your firm?

A No, I don't know what he said to the officers of Modern.

Q Do you know how you came to be retained by Modern?

A Yes.

Q How?

A Mr. Oard, as I indicated, came to my office with Mrs. Arlinghaus on this day, May 22, and desired to have us represent the corporation in connection with obtaining back of the books and records and papers.

Q Were you retained by Mr. Eberle to bring a summary proceeding to get back the particular certificates and records?

A Yes.

Q Do you recall making an affidavit on September 4, 1970 in opposition to Mr. Pepper's motion for summary judgment? You said on or about May 20 your firm we retained by Mr. Eberle to recover his certificates which were also in Mr. Pepper's possession.

A That is right, yes sir.

MR. DOBBINS: I think the date is June 3rd.

MR. MATTHEWS: September 4th?

MR. DOBBINS: I am sorry.

Q Do you recall an affidavit you made in this proceeding dated September 4 in which you stated at or about the same time the firm was retained by Eberle and another to recover his certificates also in Mr. Pepper's possession? Do you recall making that affidavit?

A I don't recall making it but I am sure it is so and I believe that is a true statement.

Q On your deposition held on April 7, 1970, referring to page 34, bottom of the page, line 25:

"Q At any time prior to June 8, 1968, did you represent Mr. Eberle or did you firm represent Mr. Eberle?

"A No. I don't really believe we ever represented Mr. Eberle, although Mr. Eberle, it seems to me, was in communication with Mrs. Arlinghaus, but I don't believe we represented Mr. Eberle.

"I might also add, I believe Mr. Eberle was in favor of some of the things that Mrs. Arlinghaus was doing, but, again, I don't believe my representation was of Mr. Eberle."

Do you recall giving this testimony?

A I don't recall making that answer and I may have misunderstood Mr. Eberle's name. I do recall a conversation with that gentleman in Florida and I believe that is the same

person we represented in that particular New York Supreme Court proceeding.

Q Have you ever met or spoken to Mr. Eberle prior to May 29, 1968?

A I only talked to Mr. Eberle on this one occasion on the telephone and I don't believe I ever met him.

Q You never received any written retainer from him?

a Written retainer? No, I don't believe there is anything in writing.

Q Did you ever send Eberle a bill for your services in connection with the New York litigation?

A No, our agreement was that he wouldn't be paying for his representation or our legal services.

Q Did you ever write on any of the matters and inform Mr. Eberle of the outcome of the litigation that you brought in his name?

A Did I ever have communication with him otherwise?

Q Report to him what happened.

A It may well be on May 7 -- I don't have a very clear recollection of it. It seems to me there was some conversation.

MR. DOBBINS: May or June.

A June, because Mr. Pepper as I recall turned over Mr. Eberle's certificates and they were then tendered.

Q Mr. Eberle wasn't present at that meeting on June 7?

A That is right. There was some telephone conversation possibly with him on it because his certificates were turned over in the tender.

Q Don't you know he authorized Mrs. Arlinghaus to pick up his stock certificates from Mr. Pepper?

A That is what I am referring to.

Q Did you participate in the drafting of the agreement, Exhibit A?

A I don't recall any real participation as such. I believe I obviously saw it. I saw what Mr. Rosen had prepared and I approved it procedurally for my clients but not substantively.

Q Mr. Rosen presented an earlier draft of the agreement and did you go over it and make changes in it?

A He may have presented an earlier draft. I don't recall any changes other than the one that appears on the final here. There are several additions.

Q Did you recommend that all the stockholders who were present sign the agreement?

A I recommended to the contrary from the beginning of the day not to sign for payment to Mr. Pepper. This was my position throughout.

Q You recommended that they not sign?

A I recommended from the beginning of the day until the end that they not pay Mr. Pepper one penny.

Q Have you read paragraph 6 of the agreement?

A Yes.

Q Does that state your position?

MR. DOBBINS: I object to that question.

THE COURT: Sustained.

Q Did you at the meeting say anything to the stockholders after they signed the agreement and the assignment about seeking to set it aside?

A No.

MR.DOBBINS: Limited to that day?

A Talking about this particular meeting after they signed the agreement you are talking about?

Q Yes.

MR.DOBBINS: June 7.

Q June 7.

A Hardly any conversation of any kind after they signed it and everybody packed up and went home.

Q Did you state to them that it is only an agreement to pay Pepper; if they didn't pay him Pepper would have to go into court and they could set up duress and coercion?

A Early in the day that matter came up. It was

the subject of some discussion initially raised by Mr. Pepper--I am sorry, Mr. Unger at the stockholders meeting. That subject was discussed at the stockholders meeting.

Q By Mr. Pepper?

A I meant Mr. Unger.

Q What didyou say about it?

A The question was put to me concerning how the matter would come up procedurally. As I recall our discussion ensued about it and I pictured the way in which it would come up but my advice throughout the meeting was they not give Mr. Pepper a penny.

Q Did you listen in on Mr. Unger on the telephone conversation to Mr. Weil?

A Yes.

Q Did you say to the group that you couldn't give an opinion on the ability to get out of the thing and the proposed settlement?

A I declined to give any opinion about getting out of any agreement with Mr. Pepper at this stockholders meeting, that is right.

Q Did you have anything to do with the stockholders rescinding the assignment?

A Our office did. I don't recall that I had anything to do with it. Mr. Hagen of my office was contacted

and then I believe Mrs. Arlinghaus came in and Mr. Hagen attended to the counterassignment.

B61 Q You discussed that with Mr. Unger on the 7th at the meeting, didn't you, after the thing had been signed?

A I didn't discuss it with him, no. It is not fair to say there was a discussion. Mr. Unger said to one and all what he would do if in fact they ever served a counterassignment.

Q He mentioned that to you at the meeting?

A He mentioned it, discussed it in the presence of everybody. He didn't discuss it with me specifically at all.

Q Was it discussed in the presence of the stockholders?

A The same statement Mr. Unger made was made in front of all the people later in the day after the stockholders meeting broke up but it was made to the stockholders as such.

Q What did Mr. Unger say in that connection?

A He simply said that if he received a counter-instruction during the next week or so prior to the actual closing and transfer of the money, which I believe took 10 days or so later, that he would be in a position of being faced with conflicting claims and would act accordingly.

B. 62

1 arcg Rosen-direct

THE FIRST NATIONAL BANK OF CINCINNATI,

vs. 68 Civil 4570

SIDNEY PEPPER, et al,

vs.

ELSIE W. COX, et al.

May 22, 1975
12:00 P. M.

- - -

(Trial resumed.)

MR. DOBBINS: I call Mr. Rosen.

J A C K A. R O S E N, called as a witness on behalf of cross-claimant being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Would you please state your residence, Mr. Rosen?

A 39 Cow Lane, Kings Point.

Q Are you engaged in any profession or occupation?

A Yes, I am an attorney.

Q Here in New York?

A In New York.

Q How long have you been an attorney?

A Almost 40 years except for a period during World War II.

Q You are admitted to practice in the State of New York?

A And the Southern District and Eastern District as well.

Q Back in 1968 you were I take it practicing here in New York City?

A I was.

Q At what address?

A At that time, 1968, I think my office was at 25 West 43rd Street.

Q Were you retained during that year at any time by Mr. Sidney Pepper?

A I was.

Q Would you relate the circumstances of that retention?

A Yes. Mr. Pepper approached me concerning some dispute between Modern Talking Picture Service Inc., a client of his, I should say a former client of his and himself and at that time he advised me that there was a motion pending; that he filed a lien, an attorney's lien on some documents,

not to come down to the motion to give you notice where he could be reached or where you could be in contact with him following the motion?

A Counsel, all I did was go in to argue two motions, to defend one motion and argue the cross-motion. I made no alternative plans. At the termination of the motion I expected to get in touch with my client.

Q Would you answer my question? Did you make any arrangements prior to the arguing of the motions for Judge Riccobono at June 5 with Mr. Pepper where you would get in touch with him quickly?

A No, sir.

Q Showing you what has been marked as Cross-Claimant Exhibit 8, which is copy of a letter which you wrote to Judge Riccobono on June 5, you state in the third paragraph, the first sentence, "I cannot reach my client until 5 p. m. and was then advised that I could not consent to the delivering of said document since attorneys for petitioners I am informed have not been retained by Howard Eberle, one of the above named petitioners."

Does that refresh your recollection, saying you could not reach your client until 5 p. m. that Judge Riccobono did in fact give a direction that you come back sometime that afternoon?

A He didn't give me any other reason.

Q This is the sole reason advanced to you by Mr. Pepper for refusing to accept this bond?

A He didn't want to give up his right of lien.

Q Is it your understanding of the law that if the lien is bonded that he give up the right to the lien?

A The lien is given up once the papers are relinquished. That is the whole purpose of the motion.

Q In other words you yourself even though the lien would have been fully bonded would have advised against acceptance of the bond?

A I did advise against it.

Q What was the reason for advising against accepting the bond?

A Because he would be giving up one of his rights. He had a right to an attorney's lien on the papers. In accepting the bond he would give up all documents and papers upon which he had impressed the lien.

It would be similar to placing a lien on a car and getting a bond on the lien, he gives up the car, he automatically gives up his lien. You can then proceed on claims in court and have an action pending there but he has given up the lien when the bond is filed.

Q Lets talk about the mechanics lien on the car --

A Yes.

Q This is a second draft which you brought back to the office of Modern Talking Picture?

A That is correct.

Q Did you have any discussions with Mr. Kelly prior to the execution of that agreement?

A Yes.

66 Q Could you relate the substance of those?

A Do you want me to give you the entire thing as it occurred or just limit myself to discussions with Mr. Kelly?

Q Just Mr. Kelly.

A I met with Mr. Kelly and Mr. Unger. Unger was the attorney and participant of the group thatwished to buy the Modern Talking Picture. This was at the office of Modern and it was in the morning of June 7, 1968. It was a Friday.

When I first went up there, Mr. Unger carried the conversation because he was the one I spoke with on the telephone.

I have to go back, your Honor, to give a coherent story.

I was advised earlier that morning about maybe 9 or 10 by Mr. Pepper that Modern and the stockholders were

considering a settlement of the matter.

I was told to contact a Mr. Unger at Modern Talking Pictures. I called Modern and spoke to Mr. Unger and he said I think we can work out a settlement, can you come over?

I went over that morning to Modern's offices and sat with Mr. Unger and Mr. Kelly, the three of us. Mr. Unger was the one who carried the conversation in the beginning.

Mr. Unger suggested that this matter should be settled for $75,000. I told Mr. Unger that I did not know whether Mr. Pepper would accept the $75,000 but I know that he would accept $100,000.

Mr. Unger said my recommendation is you better take the $75,000 or else we will go the asset route and you know what Mr. Pepper can do with all of his papers.

After that I said do you mind if I leave the room and call my client? I called Mr. Pepper, recommended to him that he do accept the $75,000 settlement in view of the fact that his lien would be worthless if he went the asset route.

He said you do whatever you think is best. I went back and we discussed the details of what the agreement should provide.

Mr. Kelly at that stage advised me that his clients do not have the $75,000, that he would give us an assignment of $75,000, that the Unger group will pay and it was to be prorated amoung all the stockholders according to their stock percentages.

At that time I told Mr. Kelly that we had no claim against the stockholders, our claim was against the corporation and Arlinghaus and Eberle.

Mr. Kelly advised me that Mrs. Arlinghaus had met with the stockholders and convinced them and they had agreed they would pay their proportionate shares of any monies being paid to Mr. Pepper.

There were one or two other items we discussed, I would have to see my original draft of the agreement, and based on the --

MR. DOBBINS: Please, Mr. Matthews, he is giving his best recollection. You can look at that later.

Q I would like to have your best recollection if I could, Mr.Rosen.

A I know there was several other matters which were discussed and I then went back to my office, which is about six or eight blocks away, severn blocks away, and I prepared the first draft of an agreement.

I brought it back to Modern and Unger, Kelly and

myself went over it. Kelly insisted on certain changes and I advised him that they would be all right. When we completed that discussion I went back to my office and prepared the second draft.

I came back, my guess about four, between four and five oclock, about that time, with the second draft and I think there was some small changes they requested in the agreement, the irrevocable assignment I prepared and Mr. Kelly requested some small changes and if I remember correctly, we made those changes by having one of the girls in Modern at that stage type it. It is really a second draft with those other changes.

When that was completed I was advised that the stockholders were present at Modern in another room and the agreements were given to Mr. Kelly, he took them into the stockholders. I called Mr. Pepper who at that time was waiting at my office for a call, to come over with all the papers he had impressed a lien on.

He came over and when he came in, he signed the agreement that had already been signed by the stockholders. He signed the agreement and he turned the papers and documents over to Mr. Kelly and received a receipt for certain stocks.

THE COURT: We will stop for lunch now. 2:15, gentlemen.

(Luncheon recess taken until 2:15 P. M.)

Q I notice there are a couple of small changes even in this document. Were they made at your suggestion or Mr. Kelly's suggestion?

A All the changes were made at Mr. Kelly's suggestion, including the changes you are referring to.

Q Were you there when Mr. Pepper signed?

A Yes, when Mr. Pepper signed I was there. Pepper signed in the little conference room where we were.

Q Had all the other stockholders who signed before Mr. Pepper signed?

A Yes, it was all signed.

Q How many copies were there?

A Approximately 20 to 25 copies were prepared.

Q You say the assignment was not changed, just the same as it had been originally prepared that is annexed to the copy?

A That is correct.

Q I notice that the assignment at the top of the page has the notation, almost covered up with the clip. Do you recall what that was?

A Yes. A copy of the irrevocable assignment I served on Sherman Unger who represented the buying group and that is an admission that he received a copy of the irrevocable assignment.

serve as nominee of Mrs. Arlinghaus which she subsequently confirmed.

Q Were you originally invited by Mr. Pepper?

A I was asked if I would serve as Mrs. Arlinghaus' nominee and on her asking me I consented.

Q Were you serving as her nominee on that meeting, May 24?

A I thought I was and bringing in an offer that was a half million dollars better than another offer. Since she was the majority stockholder and stood to profit most.

Q On that March 22 meeting which you testified, I believe that was the first meeting that you attended, was it not?

A That is correct, the meeting at which I was appointed in place of Mr. Arlinghaus' brother who resigned.

Q Was there any discussion of the Sonderling offer at that March 22 meeting?

A I don't recall any real discussion of the Sonderling offer at that meeting. There was at the meeting of April 8,

Q Was it discussed at all on March 22, at the board meeting?

A As a formal matter on the agenda of the board?

P R E B E N J E N S E N, called as a witness on behalf of Cross-Claimant being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. DOBBINS:

Q Mr. Jensen, would you state your residence, please?

A 1 Mill Spring Road, Manhasset, New York.

Q What is your occupation or profession?

A I am an attorney.

Q Here in the State of New York?

A Yes.

Q With whom are you associated?

A I am associated with Casey, Lane and Mittendorf, 26 Broadway.

Q How long have you been associated with them?

A Since 1958.

Q Directing your attention back again to May and June 1968, were you assigned to the task of handling some litigation pending in the New York Supreme Court directed against Mr.Pepper on behalf of various shareholders of Modern Talking Picture Service?

A Yes.

Q Who assigned that task to you?

A Mr. Kelly.

Q Did you actually draft the papers on behalf of the various petitioners in that action?

A Yes, sir.

Q On June 5, 1968 on the return date of the order to show cause which has been marked as Cross-Claimant Exhibit 25, did you on that date appear at Special Term Part 1 for the argument of that order to show cause?

A I did.

Q Would you briefly tell the Court in your own words--withdrawn.

Who was the judge?

A Judge Riccobono.

Q He was presiding at Special Term Part 1?

A Part 1, yes, sir.

Q Would you please briefly tell the Court what transpired at that time?

A Yes.

MR. MATTHEWS: I object to this, your Honor, because it has been gone into and its probative force certainly is not apparent to me and I think it is irrelevant and immaterial.

THE COURT: I will allow it.

72 A I met Mr. Rosen at the court. He answered ready

for the respondent and I called ready for the petitioner. When later on this particular matter was called for argument, he beat me up to the counsel table and started arguing the cross-motion and I stopped him and told the judge that I was the petitioner's attorney and I should be heard first I thought. The judge ruled I should be heard first and afterward I made my argument, speaking without notes as I recall, having the moving papers in my hand.

I don't remember the substance of the argument but I was following the papers presenting our case as it was presented.

After that Mr.Rosen started his argument on the cross motion and set up various defenses, jurisdictional and procedural.

During his argument Mr. Justice Riccobono broke in and made a statement which in substance was that he agreed with our position that the bond should or at least substitute security should be accepted by the lawyer in lieu of the papers that he held. Mr. Rosen right away agreed with that. It is my best recollection Mr. Rosen did not get back to this defense but from then on directed his argument to the terms of the bond and made various objections, various criticisms but explicitedly stated that the bonding company, which was Globe Indemnity Company,was a satisfactory company.

He thought the terms could be rewritten and in a three-way exchange between the judge, me and Mr. Rosen it was agreed that we should reword the bond so as to meet Mr. Rosen's requirements.

During this discussion I met with Mr. Rosen who said he didn't know where Mr.Pepper was and thought he had to communicate with him first.

At the end of that Justice Riccobono made a direction, gave a direction to Mr. Rosen to communicate with me before four o'clock that afternoon in order to work out the proper terms for the bond and at that time we left.

THE COURT: You say communicated to me?

THE WITNESS: Yes, sir.

Q By four o'clock -- you had a session at Special Term Part 1?

A That is correct.

Q By four o'clock had Mr. Rosen communicated with you?

A He had not.

Q What did you do next?

A I wrote a letter to Justice Riccobono and hand delivered it to him and to Jack Rosen.

Q I show you Cross-Claimant Exhibit 7.

THE COURT: Did you order it hand-delivered to

MR. DOBBINS: The original was not served in accordance with the new civil action and this is taken on the second order. That is why there are two jackets.

CROSS-EXAMINATION

BY MR. MATTHEWS:

Q You say this Supreme Court action that you have just been talking about was never concluded?

A No, sir, I didn't say that. I said no order was entered. It was concluded by a letter that was sent to the judge after Mr. Pepper surrendered the papers and the stock certificates. I think you will find it in the cout file.

Q After the settlement agreement?

A That is right.

MR. MATTHEWS: Thatis all.

THE COURT: Thank you.

(Witness excused.)

MR. DOBBINS: That completes our case subject to a half hour or 45 minutes of depositions of various other plaintiffs which is fairly ministerial. For the purposes of making out a prima facie case we will have to read it in.

THE COURT: Well we will read them until about 4:15.

Mr. Matthews suggests that all the depositions be deemed to be before the court and available for reference

the rest of you willing. That is all we are going to do.

Let us now use up the remaining 25 minutes today and then we will suspend.

Please proceed.

MR. DOBBINS: This is from the deposition of Harry Bogaards who was one of the petitioners herein.

MR. UIHLEIN: Does your Honor want the original before him as we go along?

THE COURT: No, I will just listen and if there is any objection I may have to look at it.

MR. DOBBINS: Line 3 page 3 --

MR. MATTHEWS: Is this being offered in evidence?

MR. DOBBINS: Page 3 line 12:

Q Prior to June 7th of 1968 were you a stockholder of Modern?

A Yes.

Q Were you a director or officer of Modern?

A An officer.

Q In what capacity?

A Vice president.

Q Were you earning a salary?

A Yes.

Q Mr. Bogaards, where do you reside?

A 55 Highfield Avenue, Port Washington, New York.

Q Do you know Mr. Pepper, Sidney Pepper?

A Yes, I do.

Q In what capacity?

A He used to be my lawyer.

Q Until what date was he your attorney?

A Oh, I would say up to the beginning of 1968. Right in the spring of 4968.

Q When you say he was your attorney, you mean personally?

A Yes.

Going to page 10, line 22:

Q I show you a document -- I show you a memorandum of agreement dated June 7, 1968 between Mr. Pepper and the stockholders and marked as Defendant's Exhibit A and ask you if you recognize this agreement?

A Yes.

Q Did you execute this agreement?

A I signed it.

Q Did you also sign the assignment attached thereto and made a part thereof whereby the sum of $4,369.61 out of the proceeds that would be received from you on the sale of your Modern stock was irrevocably assigned to Sidney Pepper?

A I signed that.

Q Did you read or have this agreement read to you?

A I read it myself.

Q Did you read that this was an agreement whereby Mr. Pepper settled his claim for $75,000 total?

A Well, that was part of it.

Q Did you also read paragraph 6 of this agreement?

A Let's see it. Yes, I read that but I don't consider that I signed this thing under anything but duress and pressure.

Q In what way?

A I feel that signing this thing was a pressure to get Rosalie Arlinghaus stock and its corporate appers away and there was no other way of doing it.

Q When you say this was duress and pressure, duress and pressure by whom?

A Well, very frankly, it was indicated that if this thing was not signed, we would never see the stock or the corporate papers. This is the impression that I personally felt.

Page 16, line 7:

Q Were you advised of the fact that Mr.Unger, Mr. Unger's group were willing to purchase the assets of Modern instead of the stock of Modern if Mr. Pepper didn't

execute Defendant's Exhibit 29?

A I don't really know.

Q You don't know whether Mr. Unger's group were prepared to purchase the assets rather than the stock?

A I don't recall that at all.

Q You don't recall that?

A No.

Q Do you recall whether there was any conversation at that meeting pertaining to the possibility of the purchase of assets instead of stock by the Unger group?

A Not that I remember.

Page 25, line 13:

I remember this piece of paper fairly well, because Sidney here brought it to me. There was not one signature on it when it came to me and I refused to sign it unless Rosalie Arlinghaus and Howard Eberle signed it first.

As a matter of fact, I don't think I even read it. I was not aware of what the hell the damn thing said. That's why I wouldn't sign it.

It was signed after Rosalie Arlinghaus and Howard Eberle signed it. That's when I signed it.

Q Did you then read it before you signed it?

A Not particularly, because it goes far back. If Rosalie Arlinghaus decided something was okay, I went along,

just like I went along with her husband before he died.

To me, their word was gospel. That's the way it was.

Q Did you sign before Howard Eberle signed?

A No. As I recall, the two signatures that were on there after I signed, were Rosalie Arlinghaus and Howard Eberle.

Q Nobody else?

A Not that I can recall. I don't think so.

Q Did you discuss it with them at all?

A No, sir.

Q I noticed the other signatures here are Anna Marie Schlereth, Elsie W. Cox. Did you discuss it with them?

A No, I did not.

Q You were present at the session at which the agreement of settlement was entered into?

A Yes, I was.

Q On June 7, 1968?

A I guess that was the date. I don't recall it. I mean, I know I was at that meeting.

Q And you signed the agreement?

A I signed the agreement.

Q At the time you signed it, did you intend to

revoke it?

A No, sir. I signed that piece of paper because I felt there was no other way out to get the stock certificates and the corporate books that Mr. Pepper had hidden away someplace, wherever, and there seemed no, no other way, except to sign this thing to get this deal consummated that we were involved in.

Q Did you know Mr. Unger?

A I met him for the first time in that room that day.

Q Was it not discussed that if they could make the settlement with Mr.Pepper the deal could be closed on the asset route instead of buying the stock?

A I don't recall hearing that. You see, Unger was talking to our corporate president and to other people that were involved in this.

As I say, I wasn't privy to what they were talking about. There were at least a dozen people in that room.

Page 34, line 4:

Q You said that you signed the agreement under compulsion?

A I feel I did, yes.

Q Did any of the other stockholders feel the

same way?

A This was my personal contention. I mean, I didn't discuss it with anybody else.

I just felt that I had to sign this thing or the stock certificates would never see the light of day. It was that simple.

I would assume, and it's only an assumption, that the other stockholders felt the same way. I didn't discuss it with them.

Q At the time you signed it, did you intend to go through with it?

A I would assume I did, yes. I mean, I had no designs whatsoever. I signed it freely but under duress.

It is my feeling that it was strictly under duress.

Q And you deliberately signed, saying that you signed it freely?

A How can you see it's freely when it's under duress?

Q That's what you said in the agreement.

A Let me ask you something.

Q Okay.

A If you have a gun at your head and the guy says he is going to pull the trigger unless you do something,

what are you going to do? Are you going to let him blow your brains out?

74 Q I don't sign anything like this which says that I am signing freely.

A It may say in there that you are signing it freely, but my contention was that I was signing it under duress. The fact that the word "freely" is in there doesn't mean a damn thing to me.

Q And you really didn't intent to carry it out at the time you signed it?

A You are saying that, not me.

Q Well, I am asking you?

A I didn't have any feeling that I was not going to do it at that time when I signed it. I felt that the only way that the stock certificates could be released was for me to sign this thing, which I did. Now, what happened afterwards, you already know.

Q You agreed that Pepper had performed services for which he should be compensated without specifying the amount, did you not?

A Are you asking about services in that particular case?

Q Yes.

A As far as I was concerned the amount of money

that I originally specified weren't specifically for, for this thing.

Q Didn't you agree that Pepper should have $100,000 out of the Sonderling deal?

A I told you I never remembered that.

Q You knew Mr. Pepper had screened and worked on a number of proposals to take over the company, did you not?

A Over the year, yes. He had worked on various proposals, I am sure, which he discussed with me on the telephone at various times.

I knew that he had done a lot of leg work, you know, on proposals like that, and I felt that he was doing it for the company. Let's face it, he wasn't doing it for me in particular. He was doing it for the corporation.

Q And for --

A And for that --

Q And for the stockholders?

A I know -- I don't think it was for the stockholders. I think he did it for the company. I mean, as far as I was concerned, that anything he did for the company was good for the company, so that's the reason I mentioned a specific amount of $25,000 for the services that he had gone into and for the leg work and doing work he had done to prepare

these various things.

Q And you didn't regard this as a misstatement then in the agreement, Exhibit 1 "Whereas Pepper has heretofore performed numerous and various legal services for the corporation and the stockholders consisting of negotiations, agreements, meetings, et cetera with a view toward selling either the assets or the stock of the corporation"?

A Well, I signed it, didn't I?

Q You agreed that that was true?

A It looks like one of these -- I don't even remember signing that thing.

I guess I did sign it. This was the same day of our meeting, apparently, June the 6th -- June the 7th?

Q June 7th.

A Well, I guess this is the thing we signed which I felt was under duress. Let's face it.

Q Didn't you agree that Mr. Pepper's services in connection with these various offers and negotiations for the sale of the company or its assets should be compensated?

A I agree.

Q In other words, your feeling about it is that the amount he claimed was too much?

A Much too much.

Q And that $25,000 that you say you offered him was appropriate and that he should be paid?

A I think that $25,000 was a reasonable amount, yes, I do.

Q Did you discuss it with the other stockholders that assembled at the settlement meeting?

A It's possible. I don't recall who I might have discussed it -- I mean, I just felt in my own mind that in making this offer that I could convince the stockholders that this was a worthy amount of money for the job that was done.

Q And what job did you have in mind?

A I am not talking about jobs per se. I am talking about jobs, period, the various things that Sidney had done.

I mean, as I go back to the leg work and preparation of various proposals to different people.

Over to page 47, line 9. This is cross-examination by Mr. Jensen.

Q You said, Mr. Bogaards, that you agreed that Mr. Pepper had rendered services which you characterized as leg work and other services, and that you agreed that those services should be compensated.

Were those services from Mr. Bogaards, rendered at your request?

A Oh, no, no.

Q To your knowledge, were those services rendered at the request of any other stockholders?

A I don't think so, no, sir.

Q By whom do you then agree that the services should be compensated?

A What is that question again?

Q By whom is it that you agree that the services should be compensated?

A Probably by the corporation, I would say.

Skipping back, and this is Mr. Matthews again, at page 39, line 17.

Q And you knew, did you not, that the Sonderling deal which provided $100,000 for Mr. Pepper was so arranged tax-wise that it would be more economical for the corporation and the stockholders --

A How would I know that? Nobody ever told me that.

Q Well, you signed the consent.

A I told you I signed that piece of paper.

Q Which provided for $100,000 for Mr. Pepper?

A Wasn't that a finder's fee? It certainly wasn't a legal fee, was it?

Q It was a legal fee.

A Does it say that?

Q No.

A I think it shoulddesignate it if it's a legal fee.

Going back to redirect examination by Mr. Matthews of Mr. Bogaards at page 48 line 3:

Q You said the $25,000, your appraisal of the value of his services, was in connection with various proposals?

A That is correct, sir.

Q And you knew, did you not, that Mr. Lenz or other officers or directors had referred these proposals to him?

A No, I did not. I don't know where he got the proposals from.

Q Those proposals included offers for the purchase of the stock of the corporationor of the assets, did they not?

A I don't know. I mean, we --apparently, at that particular time, there were at least a dozen offers that I knew about personally. I mean, you read it in the papers; people came in directly to me.

Q That included the sale of the stock?

A I wouldassume they wanted to buy the company,

period. Whether it was the stock or the assets, you know, it didn't make any difference. I know there were offers.

Q And you knew that Mr. Pepper worked on all of these proposals?

A I didn't say he worked on all of them. I said I knew he was working on several, because he had mentioned several to me on the telephone, and I know that there was a lot of time and effort goes into the preparation of these things, and I think that anybody who works should be adequately paid for the job he does.

That's my personal feeling.

Recross-examination by Mr. Jensen:

Q You said before that the reason that you knew that Mr. Pepper had worked on various proposals was that Mr. Pepper mentioned it to you.

Did you have any other source of that information?

A No.

MR. DOBBINS: That completes the deposition of Mr. Bogaards.

THE COURT: Let us stop here then and pick up with those depositions when we meet on June 2 at 10 a. m.

Off the record.

(Discussion off the record.)

(Adjournment taken until Monday, June 2nd, 1975 at 10 a. m.)

that Mr. Pepper be paid a definite amount for his services?

A I don't know whether I made a suggestion at that meeting, or what, but I made a suggestion of $25,000 directly to Sidney on the telephone, but I don't recall what date that was.

I don't even know whether it was involved with this situation or not.

Page 26, line 16:

Q You knew Mr. Pepper had screened and worked on a number of proposals to take over the company, did you not?

A Over the year, yes. He had worked on various proposals, I am sure, which he discussed with me on the telephone at various times.

I knew that he had done a lot of legwork, you know, on proposals like that, and I felt that he was doing it for the company. Let's face it, he wasn't doing it for me in particular. He was doing it for the corporation.

Q And for --

A And for that --

Q And for the stockholders?

A I know -- I don't think it was for the stockholders. I think he did it for the company. I mean, as far as I was concerned, that anything he did for the company was good for the company, so that's the reason I mentioned a specific

amount of $25,000 for the services that he had gone into and for the legwork and doing work he had done to prepare these various things.

Page 38, line 18:

Q Didn't you agree that Mr. Pepper's services in connection with these various offers and negotiations for the sale of the company or its assets should be compensated?

A I agree.

Q In other words, your feeling about it is that the amount he claimed was too much?

A Much too much.

Q And that $25,000 that you say you offered him was appropriate and that he should be paid?

A I think that $25,000 was a reasonable amount, yes, I do.

Q Did you discuss it with the other stockholders assembled at the settlement meeting?

A It's possible. I don't recall who I might have discussed it -- I mean, I just felt in my own mind that in making this offer that I could convince the stockholders that this was a worthy amount of money for the job that was done.

Q And what job did you have in mind?

A I'm not talking about jobs per se. I am talking

Q What is your name and address, please?

A Richard M. Hough, 430 South Burnside Avenue, Los Angeles, California, 90036.

Q Mr. Hough, would you give us the history of your association, employement by Modern Talking Pictures and so forth?

A In 1939 we merged my company, Allied Film Exhibitors of California, and sold 51 percent of the shares to Modern Talking Picture Service, and at that time my two partners stayed out in California to run it and I came to Chicago as the Middle West manager of the company, stayed there from 1940 to 1960; time out for the war, and went to California for three, four years, and at the death of Mr. Arlinghaus I came back to New York and became general sales manager.

I was made vice-president sometime during the 50's. I don't remember when.

Q Go right ahead.

A Then in 1968 I resigned as vice-president and went to California to assist in the sales office there, but, principally, to develop properties and equipment for sale.

Q Properties?

A Film properties. This was prior to my retirement in 1970 at the age of 65.

Page 28, line 25:

2 Q. Do you remember signing Plaintiff's Exhibit 1, a
3 so-called settlement agreement?
4 A Yes, I am very familiar with it. Here it is.
5 Q Did you read it?
6 A Yes.
7 Q Before you signed it?
8 A Yes, we all read it very carefully.
9 Q Did you agree to it?
10 A We signed it.
11 Q Does that indicate that you had your tongue in
12 your cheek when you signed it?
13 A Well, we felt that it was definitely done under
14 duress. Unger had all the checks available for everybody.
15 It was the last date of his offer. There it was, and, so,
16 we signed that thing.
17 I certainly expected to pay it, but we hoped we wouldn't
18 have to, because we felt that this was done under duress.
19 Page 30, line 17:
20 Q Was it discussed generally that this was signed
21 under duress --
22 A Yes.
23 Q -- at that meeting?
24 A After the meeting, yes, and at the time. Before
25 and after.

Q Did Mr. Unger say, in words or effect, that you might just as well go ahead and sign this because you wouldn't have to pay it anyhow?

A No, I don't think those words were said.

Q Anything to that effect?

A Not to that effect. We hoped we would not have to pay it. We felt that there was a very moot point that, apparently, could only be decided by court action.

Q Had you at that time, you and some of the other stockholders, decided that you would have to take court action and would take court action?

A We all went along in agreement with the court action being started and we agreed to instigate it.

B77 Q That was understood and agreed among many of you at the meeting?

A No, not at that meeting. They said they would go into "Is there a case or isn't there" and, later on, it was decided to go ahead.

Q Did you have subsequent meetings on that subject?

A Well, there were not complete stockholder meetings. It was discussed individually, you might say.

Q With one or two at a time or --

A I don't really know. You see, I left for Los Angeles shortly after that. I mean, I was actually in California

when this whole thing was started.

Q Wasn't it generally understood that a suit would be brought subject to the approval of cousel?

MR. JENSEN: When?

Q At the meeting on June 7?

A No decisions were made at that meeting regarding the suit. It was agreed to be looked into.

Q Agreed to be what?

A Looked into by the attorneys.

Q That was as far as you got on June 7?

A Yes.

Page 32, line 23:

Q And you, as a stockholder, joined in the warranty and representation that you were executing this agreement and the assignment of the $75,000 of your own free will, in the presence of each other and attorney William E. Kelly, Esq., who was present at the execution of this agreement?

A Yes. However, we did it very reluctantly. We felt that it was blackmail, almost.

I mean, here Unger stood there with $2,800,000 worth of checks for everybody and it had been delayed twice, and it looked like there was no other way to go except a lot of problems, and, for goodness sake, you might as well have a gun pointed at you.

Q What is your name and address?

A Ralph Del Coro, Meyersville Road, Greenvillage, New Jersey.

Q Mr. Del Coro, are you still associated with Modern Talking Picture Service, Inc.?

A In terms of the word associated, yes, I am.

Q Give me, briefly, a history of your association with that corporation.

A At the present time?

Q No, go back to the beginning.

A I was employed by Modern Talking Picture Service in 1954 or 1955. I stayed as an employee and subsequently an officer of that corporation until June 30, 1970, when I formed a new corporation Modern Mass Media, Incorporated, in which I am the president and my present association with Modern Talking Picture Service is that they are presently a customer of mine.

I am not an employee, or anything else, nor advisor to adviser to the corporation.

Q What office did you hold?

A I was vice-president for Eastern sales in my last office.

Q And your office was here in New York?

A Here in New York, yes.

A There certainly was.

Q Who participatedin the discussion?

A I for one.

Q What did you say about it?

A I think I used a term that I thought it was a pistol point at our heads.

Q Was it suggested that you would not have to pay the money after all?

A No.

Q Did Mr. Unger say, "Go ahead and sign it because we do not have to pay, you would not have to pay?"

A No, not to my recollection.

B80 Q Did you intend to pay it when you signed this?

A I intended to see if we could get it set aside. It was my intention to see if we could get that set aside.

Q You so interested yourself?

A Yes, probably.

Q Others joined in the same thought?

A I cannot comment on that. It is four years ago and I can remember what I said but I cannot testify as to the statements of others.

Q In other words, you signed this intending to set it aside?

A No, that is not what I said.

Q You recited in this agreement that you say that you read before you signed it, "Pepper heretofore performed numerous and varied legal services for the corporation and stockholders consisting of agreements, meetings, et cetera, with a view towards selling either the assets or the stock of the corporation."

A I read it and I signed it, yes, and I explained why I signed it after I read it.

Q Did you believe it at the time?

A No, I did not.

Q You mean you deliberately signed something that you did not believe in?

A May I have the document back, please? You are saying something here that just isn't so, Mr. Matthews. Come on.

There are many other things in this document, too. We both signed contracts many times in different ways. Yes, Mr. Pepper made that allegation. I also signed. It was a reservation that I expressed, not only to that part of the document but the whole document as a body, right.

Q Did you read this paragraph before you signed it, paragraph 6, "Stockholders warrant and represent that they are excuting this agreement, and the assignment of the $75,000 of proceeds of their own free will in the presence

of each other and their attorney William E. Kelly, who was present at the execution of this instrument?"

A I already testified that I have read the entire document and that I signed it with reservations and it applies to the entire document.

Q Will you point out the reservations that you put in the document?

A I did not. I did not put a reservation in the document. I had a mental reservation as I wondered if there might not be redress in the courts because I felt the instrument was signed by me under duress.

Q Then you agreed with others of the stockholders that were there that you should revoke the instrument and see to set it aside?

A Not at that time. This came up considerably later, much later, not that day.

Q Much later?

A Yes.

Q How much later?

A Your record would establish that. Whenever we filed the suit, shortly before that time is when I agreed to go along with this program; that I had that reservation at the moment I signed it.

It was later on Mrs.Arlinghaus who decided to sue,

but I joined with the other stockholders to have this set aside in the courts. Not a repudiation but rather we are looking for redress to the Court, I believe we should.

Page 29, line 10 --

MR. UIHLEIN: One question and answer on page 20, line 13:

Q Mr. Kelly did not at that time at the meeting on the 7th of June represent you?

A I did not retain Mr. Kelly to represent me.

MR. WARREN: Page 29, line 10:

Q How much is involved in this litigation so far as you are concerned?

A I am glad you asked that question. I truly am -- this is sort of getting to the heart of the issue as you will see from the document. My exposure is very, very small, $235 or some such insignificant amount, at least in today's inflationary period. So my joining in this suit is certainly not to recoup a vast amount of money but rather for what I consider to be the moral issues at stake.

Q I see the amount opposite your name on the assignment annexed to Exhibit 1 is $231.19.

Q So my recollection was correct; yes.

That is all we have for this.

MR. UIHLEIN: Page 5, line 11, this is part of an

answer:

I did join with Mr. Oard in recommending that Mrs. Arlinghaus accept this offer.

Q You so advised Mr. Oard?

A Yes, I did, before he wrote that letter.

Q Did you attend a meeting on June 7, 1968 at the office of Modern?

A You mean there were a number of meetings that day? You mean all of them or one of them? There were meetings that day, yes, I did attend a number of them.

Q They were in the office of Modern?

A Yes.

Q What were the meetings?

A As I recall that day we were there to close on the purchase of Modern Talking Picture Service by the Unger interest and the meetings evolved around those points, getting documents ready.

Q Who else was present?

A All of the shareholders, Mr. Lenz, who is president of the company but not a stockholder; Mr. Oard, who was the vice-president of the company at that time and not a shareholder; Mr. Unger and I think one or two of his associates and of course attorneys for the corporation and people from Casey, Lane & Mittendorf. I guess it was Mr. Kelly.

Was that his name? To my recollection, Mr. Kelly.

B81 Page 22, line 5:

Q I show you a Xerox copy of Exhibit 9 dated June 12, 1968.

A Yes, it rings a bell. June 12 is when I did it; right.

Q That is your signature?

A That is my signature.

Q How did you come to sign that?

A June 12 was five days after this, so was that a Wednesday or Thursday of the following week? I obviously met with Mr. Kelly between June 7 and June 12 to retain him at that point in time because I did subsequently retain Mr. Kelly to represent us in this action, and this did stem from a meeting with Mr. Kelly.

As I told you before, until I saw this date I couldn't identify the date for you but now I can, so it was Monday, Tuesday, or Wednesday, or thereabouts we did have a meeting.

Page 23, line 12:

Q You knew about the Sonderling offer, did you not?

A Most assuredly, yes.

Q When did you first hear about that?

A The first time I heard about the Sonderling offer was in a meeting. The word "heard" bothers me. The first

time I learned the details of the Sonderling offer was in a joint meeting in the conference room of Modern Talking at which Mr. Sonderling and his associate were present and at that point in time he went on to explain substantially what his views were toward purchasing the company.

Q Who was present?

A All of the officers, I believe some of the department heads, the employee stockholders, Mr. Sonderling and one of his associates.

Q And the directors?

A The non-employee directors, rather, the employee directors of the company, not the non-employee directors.

Page 24, Line 24:

Q When did you first hear of the Sonderling offer?

A Well --

Q With reference to the March 20 date.

A Probably early April. Probably early April, the first few days in April, maybe last few days of March.

Page 25, Line 15:

Q With whom had you discussed it?

A Mr. Sidney Pepper, for one.

Q Who else?

A Most specifically Mr. Lenz and Mr. O[illegible]l.

Q At the settlement meeting on June 7th was there

any discussion of the sale of assets rather than of stock?

A I believe if my recollection serves me, he mentioned this as an alternative to the sale of the stock.

That is all for that.

MR. WARREN: The deposition of Howard Eberle, starting at Page 3, Line 8:

Q Will you state your full name and address, please.

A Howard Henry Eberle, 1334 Northwest 14th Court, in BocaRatan, Florida 33432.

Q You are a former stockholder and director of Modern Talking Picture Service, Inc., sir?

A That's correct.

Q You sold your stock interests in that company sometime in 1968?

A That's right.

Q I ask you to direct your attention to the period of April 1968, and I ask you whether during that month your stock certificates evidencing your ownership in Modern Talking Picture Service, Inc. were in the possession of Sidney Pepper.

A I believe they were, yes.

Page 5, Line 22:

Q I ask you whether there came a time when you directed Rosalie Arlinghaus to pick up for you those stock

certificates from Sidney Pepper.

A Yes, I recall this. Mrs. Arlinghaus asked me, told me, rather, that she was going to pick up her own stock which had been freed by Mr. Pepper, and if I would, if I would want her to pick up my stock, and asked me to give her authority by telegram, which I did on June 5th, 1968.

'This will authorize you' -- and this is addressed to Mrs. Arlinghaus.

Q We will mark that. You don't have to read it, Mr. Eberle.

A I would like to because - 'I would like to emphasize that this will authorize Mrs. Arlinghaus to pick one certificate for 13,000 shares in the name of the Trust, 400 shares' --

Q You're quoting, are you?

A Yes, I am quoting from the telegram.

Q All right. Why don't you just make it clear, and the Court Reporter --

A I'll make it clear, too, that it was to Mrs. Arlinghaus and to no one else.

Q All right. You looked at a copy of a telegram, I believe, when you made your last answer.

The reason why you wanted Mrs. Arlinghaus to take possession of the stock certificates was that you intended

to sell your stock to Sherman Unger, is that correct?

A That's correct.

MR. UIHLEIN: Will you read down to Line 9, please.

MR. WARREN: The telegram referred to here was marked as cross-claimant Exhibit 10 in evidence.

Q Did you understand that Mr. Unger had made a tender offer?

A Yes.

Q And were you desirous of tendering your shares pursuant to that offer?

A Originally, no. On some occasions I returned -- he, Mr. Unger, called me by telephone at my home.

Page 9, Line 2:

Q Do you recall there was a plan earlier to sell Modern Talking Picture Service to Sonderling Broadcasting Company?

A Yes.

Q Do you recall that that sale was to be accomplished through one or more brokers?

A Well, now, if you mean Mr. Weil and Mr. -- I don't know whether you consider Mr. Pepper a broker, but if you are talking about the additional $300,000 fee, I believe that's what it was. That's it.

Q Please answer my question, Mr. Eberle. We can

proceed more faster that way. I was going to ask you about Mr. Weil. I was going to ask you whether you met with a man named Harold Shapiro. Those were the two people I had in mind.

A Yes, I was.

Q Okay. Were you the conductor of the negotiations with either of the brokers for his commission?

A No.

Page 12, Line 17:

Q Tell me whether you remember that at some time in April 1968 the board of directors of Modern did meet to vote on the Sonderling proposal.

A I believe they did.

Q And you were present, sir?

A I believe so.

Q Do you recall that certain resolutions were introduced by Mr. Pepper at that meeting?

A They probably were, yes, I think so.

Q Now, my question to you, sir, is do you recall whether before that meeting you had an opportunity to look over those proposals, those proposed resolutions, I should say.

A I can't recollect.

Q Do you remember whether you were given a copy at one time or another of the proposed resolutions that Mr.

Pepper was about to --

A If I got copies of the board of directors meeting, I probably got copies of the proposed resolutions, because they would have been a part.

Q Let me ask you whether you remember ever seeing such proposed resolutions.

A Don't recall.

Q Can I take it that you don't now have a copy of such proposed set of resolutions?

A You may say that I wouldn't.

Q You are saying that you don't?

A What? That I don't have it.

Q Thank you. Do you recall whether before that meeting you and Mr. Pepper discussed the resolutions which he was about to propose at the meeting?

A I don't recall.

Q In April 1968 did you owe Sidney Pepper any money for any services rendered by him to you?

A I have never owed Mr. Pepper any money.

Q Do you remember that in the proceeding in Delaware that you referred to recently, you were sworn as a witness --

A Yes.

Q You gave testimony?

A I do.

Q Have you had an opportunity to look over the copies of the transcript which you have?

A You sent me a copy of this transcript.

Q Yes, sir.

A And I have glanced over them, right.

Page 15, Line 19:

Q Now, in order to save your time and our time and not encumber the record, rather than going through each question and answer recorded in those pages, I will ask you whether you were asked the questions shown in the copy of the transcript which has been marked B and whether you gave the answers therein recorded.

A To the best of my recollection I was asked the questions and gave the answers.

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Q And they were given, I take it, to the best of your knowledge and ability?

A That's right.

That's all we have from Eberle, your Honor.

MR. UIHLEIN: Page 32, Line 7:

Q Did you call him or write him and make inquiries about the meaning of Exhibit R?

A The meaning of this?

Q Yes.

A No, I knew the meaning of this.

Q All right. Will you explain to us what you understood it to mean?

A Yes. Mr. Vickers -- well, let's go back. Some time in the latter part of May, Mrs. Arlinghaus called me on a Saturday inquiring about the health of my wife, said she wanted to come up and see her.

I said, 'Well, where are you?'

She said, 'In Miami.'

When she drove up in front of the house she had Mr. Vickers with her and they proceeded to attempt to convince me that I should sell the shares of stock to Mr. Sherman Unger. I declined that day.

On a subsequent Saturday they again appeared at my home in Florida and at that time I acquiesced and told them that I would go along with the sale to Sherman Unger. I was being fed up by that time.

They have neither since been back at my home.

Line 16:

Q Do you recall the date of the first visit by Mrs. Arlinghaus and Mr. Vickers?

A The latter of May, I'd say.

Q Can you be more precise?

A No, I don't keep a diary. That's five years ago.

Q Okay. Was it the following Saturday that -- I

believe it was because my wife remarked, 'How many more Saturdays are we going to get visits'?

Q That's how you happen to remember it?

A That's how I happen to remember it -- no, I happen to remember it because of the pressure they were putting on me to turn it over to Mr. Unger.

Q Did you give them on the occasion of the first visit your reason for not wanting to sell it to Mr. Unger?

A I don't remember.

Q Do you recall your reason?

A Yes, I didn't -- I thought we were getting -- as I testified in the Court proceeding in Delaware -- that we were getting a better deal from Mr. Sonderling.

Page 39, the middle of an answer at Line 13:

A It was -- I had not employed -- I don't know what term you used -- Mr. Kelly or his firm.

Q That's correct. Now, where -- well, is it still correct that you had not employed --

A Still correct.

Q Still correct?

A Yes, sir.

Page 41, Line 8:

Q Did you know before receiving this affidavit, this copy of the affidavit, that you had been included as a

party plaintiff?

A No.

Q Did you receive any bill from Mr. Kelly or his firm for services or disbursements?

A No, no.

May I make a statement on that?

Q Yes, sir.

A May I look at it again?

Q All right.

A This is the first time I have seen Mr. Kelly's -- or yesterday is the first time I had seen Mr. Kelly's affidavit and I was more than shocked, I was very angry on the day that this telephone call was made, which is referenced by a copy of a bill I presume from the Casey,Mittendorf firm.

On top of the list there, May the 29th, which says on which date the deponent was retained by Howard H. Eberle.

I received a telephone call that day from Rosalie Arlinghaus who turned the phone over subsequent to her remarks which to my knowledge was probably with respect to selling the stock to Unger.

The phone was turned over to Carl Lenz. I particularly remember that because Mrs. Arlinghaus had some very peculiar habits, one of which -- which Mr. Lenz can

acknowledge -- was I heard her as she was turning it over say, 'Now, Carl, don't louse it up.'

So when Carl Lenz -- not Carl Lenz -- George Vickers -- 'George, don't louse it up', and when George got on the phone to talk with me that was the first thing I said to George, 'Make sure you do what the lady says, don't louse it up', and he laughed.

This is what makes me remember that she initiated the phone call.

The next party who got on was Mr. Kelly and he said, 'I will represent you,' and I said in no uncertain terms, 'You have not ever represented me nor will you represent me,' or words to that effect.

In other words, I made it emphatically clear to Mr. Kelly on that telephone conversation that he did not represent me.

Now, apparently subsequent to that time he chose to have Mrs. Arlinghaus have me wire her, telling her to pick up my stock.

Maybe Mr. Kelly is mistaken and if he isn't, this is an entirely an untruth, the whole thing is a fabrication.

Page 47, Line 5:

Q Then did Mrs. Arlinghaus tell you they were

going to settle with Mr. Pepper?

A I believe she did.

Q Did she indicate that they didn't expect to pay them anything?

A I think she did that on the second visit to my home by she and Mr. George Vickers.

Page 49, Line 3:

THE WITNESS: We got an offer from the employees which is a part of this testimony, I believe.

Q Is this the so-called management team?

A That's right. Somewhere in here there is a reference to a -- I am sure -- to a Bell & Howell deal which I heard a lot of talk but nothing came out of it. There was a reference to a deal with Wometco Enterprises, which I didn't know anything about, except that I did get a call from one of the -- from both of the principals of Wometco. They did not make any offer to me but they did invite me to come over to their facilities in Miami, which I never did do, and told them I was unable to do at that time.

Q Were these prospective purchasers or would-be purchasers, were they referred usually to Mr. Pepper?

A Well, I am not sure that the management offer was referred first to Pepper, but Mr. Pepper -- I have understood-- had conversations with Mr. Lenz on offers and

propositions that he had gotten. How good they were, I never knew. There may have been others.

Q Do you recall Mr. Pepper giving consideration and working on the Bell & Howell --

A Well, as I said, I heard about the Bell & Howell. As a matter of fact, the Bell & Howell deal was up when Mr. Arlinghaus was still alive, I understood.

Page 52, Line 5:

Q KMS Industries?

A Yes, I believe KMS Industries.

Q And Laird Industries?

A Yes. I don't know whether it was Laird Industries or Laird, Incorporated. We talked to a representative of them, that's right.

Q Learning Development Corporation?

A This I don't know. What was his name? Wait a minute. Learning Development. Is there a --

Q Kirby Wertheim.

A Yes, he was along with them.

Yes, then I have known about that one. It was a discussion, never a firm offer.

MR. WARREN: So the meaning is clear, the name Kirby Wertheim was brought up by Mr. Pepper who involved that name.

MR. UIHLEIN: That's right.

Page 53, Line 9:

83 Q Metro-Goldwyn-Mayer?

A I believe there was talk of it. All that you are reading here I believe were -- how shall I put it -- no firm offers, just possibilities.

Page 54, Line 3:

Q State Mutual Life Insurance Company?

A They were hooked in with somebody else but again it was a maybe, an if.

Page 55, Line 4:

Q I show you a copy of Exhibit 14, a letter dated March 20, 1968 from Mr. Sonderling to the board of directors of Modern and to the board.

You have seen that before, haven't you?

A It looks familiar, Mr. Matthews.

Q When did you first see it?

A I suppose at a subsequent meeting of the board of directors.

Q What's that?

A I would presume in a succeeding meeting of the Board of Directors. I am not sure, subsequent to March '68 at any rate.

Q Well, I show you a letter signed by Sidney Pepper

addressed to Mr. Sonderling which you and Mrs. Arlinghaus appear to have approved, dated March 22 and is Exhibit A on Esquire's deposition, 6/14/73.

A Now, this is a letter of March 22nd, 1968 from Sidney Pepper to Mr. Sonderling receiving an offer of $2,800,000 and that is my signature approving it.

Q Did you get -- does that refresh your recollection as to when you saw the March 22nd letter?

A Let's see that again. Yeah, I might have seen it around March the 21st or 22nd. I said subsequent to March 20th because I did sign it.

Page 61, Line 25:

Q Did you discuss the Sonderling deal generally with Mrs. Arlinghaus, various phases of it?

A Oh, I think that we had discussed it most times I guess in Mr. Pepper's presence.

Q Did both you and Mrs. Arlinghaus approve of it and Mr. Pepper?

A I did and I can't speak for Mrs. Arlinghaus but she gave every evidence of approving it to me.

Q Do you recall receiving this letter from Mr. Oard of Modern dated May 10, 1968 with a carbon copy to various people?

A Yes, sir, I received a copy of this letter.

Page 65, Line 5:

Q I show you Exhibit 46, minutes of the meeting of Modern Directors dated April 8, 1968. I think you wanted to refresh your recollection from these minutes.

Can you tell me whether that is substantially an accurate copy of what happened at that directors' meeting?

A Can I see the minutes of the testimony of --

Q Those minutes that I handed you were taken from the corporate minute book.

A Well, then, they must be all right. On the other side Mr. Pepper signed them. Let me read it.

That's substantially correct. That's substantially correct.

Page 67, Line 14:

Q What was the total initial investment in the nucleus of Modern?

A Modern Talking Picture Service, $5,000 in common stock, preferred stock was held by -- oh, I have forgotten how many shares of it now. It was held by Electrical Research Products, Inc. That went into --

Page 73, Line 4:

Nowhere in the files of Casey, Mittendorf or in Mr. Kelly's do you have anything on record which shows that I have signed any document appointing him attorney for me

nor did I ever, as I testified, receive a bill and I don't intend to honor it if I do receive it.

I am telling the truth and I will continue to tell the truth.

Page 73, Line 24:

Q My first question to you is this, Mr. Eberle, do you recall that during that telephone conversation, that is to say the one you had first with Mrs. Arlinghaus and then you saw Mr. Vickers --

A It's the same conversation.

Q And thereafter --

A The same telephone call, I mean.

Q Yes, about which you have previously testified.

A Yes.

Q Do you recall that the question of the fees to be paid for the proceeding which was contemplated came up?

A Never.

Q Do you recall that you made the point to Mrs. Arlinghaus or Mr. Kelly or maybe I should say to Mr. Vickers that you were concerned that this proceeding might cost you something?

A No, sir.

Q And do you recall that you received assurance that it would not and that thereafter you agreed to go along?

A No, sir, that was never in any way mentioned.

Q It is your testimony now that neither in your conversation with Mr. Vickers or Mrs. Arlinghaus or Mr. Kelly was the question of a fee or the payment of costs of litigation raised?

A That's right. There never was a question of fees or costs of litigation raised.

That is all, your Honor.

THE COURT: Anything else with respect to the Eberle deposition?

MR. WARREN: Just a moment, your Honor.

[Pause.]

MR. WARREN: Your Honor, on Page 70, Line 8, this is redirect by Mr. Jensen and a portion was read by Mr. Uihlein and I would like to read the redirect examination in context starting at Page 70, Line 8:

Q You testified earlier this afternoon that when you saw the affidavit by Mr. Kelly with which I furnished you a copy which you said, I think, you saw yesterday?

A For the first time.

Q For the first time. You were shocked. Now, Mr. Eberle, it's a fact that you knew already that Mr. Kelly had made such an affidavit, right?

A No, I did not.

Q Well, let me refresh your recollection in that respect by showing you Defendant Cross-Claimant's Exhibit D marked earlier today which is a page from the Rosen appeal in this action furnished you by Mr. Matthews. It's a letter, a copy of a letter sent by me to Justice Riccobono, and I draw your attention to the second paragraph which reads:

'Enclosed herewith is the affidavit of William E. Kelly affirming that Casey, Lane & Mittendorf has in fact--'

A I had heard about it, I had heard about it, but I had not seen it.

Q My question was -- well, you had already heard about it before and I think you answered no. Looking at this Exhibit D, your recollection is refreshed that you had heard about the affidavit before?

A That's right.

Q All right. Well, let me try to refresh your recollection a little more if I may, Mr. Eberle. I realize it is late in the afternoon but I will have to ask you, so bear with me.

A That's right.

Q And give your full attention to what I am going to ask because, as you probably realize, there is now a clash between what Mr. Kelly said in his affidavit and what your testimony has been.

A That's right, that's right.

Q About the telephone conversation, and it is very important for both of you, I think, to try to refresh your recollection to the fullest and that's my purpose for the next question that I am going to ask you.

The first question is this.

A Now, before I answer any of these questions --

Q Yes?

A Since you have made a statement, I want to make a statement that I have no --

Q Off the record you may do so.

A Well, you made it on the record.

Q Yes.

A But why can't I make it on the record?

Q Well, make it brief, please, and I will let you make it on the record.

A Well, if you don't, I will ask Mr. Matthews to ask me the same question.

Q We will listen.

84 A I want to tell you that I have no axe to grind with Mr. Pepper or Mrs. Arlinghaus. I was never a party to this litigation and I don't know why I should be brought in now.

What I have told you is the truth and I don't

care whether it hurts Mr. Pepper or whether it hurts Mrs. Arlinghaus, but I don't like people testifying falsely about an arrangement.

Nowhere in the files of Casey, Mittendorf or in Mr. Kelly's personal files do you have anything on record which shows that I have signed any document appointing him attorney for me nor did I ever, as I testified, receive a bill and I don't intend to honor it if I do receive it.

I am telling the truth and I will continue to tell the truth.

Q Right. Will you agree that there may be things about that conversation which you have forgotten by now?

A Yes, yes, sir, I will.

Q And will you bear with me while I try to possibly refresh your recollection of some of those things?

A Yes.

Q And will you give me the full, honest cooperation that you have given so far?

A Yes, yes.

Q My first question to you is this, Mr. Eberle, do you recall that during that telephone conversation, that is to say the one you had first with Mrs. Arlinghaus and then you saw Mr. Vickers --

A It's the same conversation.

Q And thereafter --

A The same telephone call, I mean.

Q Yes, about which you have previously testified?

A Yes.

Q Do you recall that question of the fees to be paid for the proceeding which was contemplated came up?

A Never.

Q Do you recall that you made the point either to Mrs. Arlinghaus or Mr. Kelly or maybe I should say to Mr. Vickers that you were concerned that this proceeding might cost you something?

A No, sir.

Q And do you recall that you received assurance that it would not and that thereafter you agreed to go along?

A No, sir, that was never in any way mentioned.

Q It is your testimony now that neither in your conversation with Mr. Vickers or Mrs. Arlinghaus or Mr. Kelly was the question of a fee or the payment of costs for that litigation raised?

A That's right. There was never a question of fees or costs of litigation raised.

Q Let me ask you next, do you recall that during that conversation you were told by one of the three or maybe more of them --

A There was only three.

Q What I mean is, by one, two or three of them, that it was the opinion of Mrs. Arlinghaus and her counsel that the only way to obtain the stock certificates from Mr. Pepper in order to tender them to Mr. Unger would be through a legal Court proceeding?

A She may have said that.

Q Did you dispute that with her?

A I didn't agree. I believe I did and I would -- I am disputing it now and I would then. I have stated to you that I have no connection with this.

When Mrs. Arlinghaus signed the original affidavit or whatever they signed for Mr. Pepper, where they listed the cost of shares all the way down the line, which is some 116,0000 is now 75 or 61, I don't know.

You and nobody here, incidentally have shown me that original paper. You will not find my signature on that paper and -- if this is the cost of litigation she is talking about, I didn't even sign that.

Q Now, I am talking about something quite different, Mr. Eberle.

A Well, if you are talking lawyers' fees, nothing like that was mentioned.

Q I am talking about the cost of the proceedings

which Mrs. Arlinghaus --

A I had nothing to --

Q Please give me the courtesy of letting me finish and I will give you the courtesy --

A I am sorry.

Q I am talking about the cost of the litigation which Mrs. Arlinghaus was contemplating in the Supreme Court in New York to obtain the stock certificates from Mr. Pepper and it is now your testimony, as I understand it, that the question of cost of that litigation did not come up in that telephone conversation.

A That's right, to my knowledge it did not come up in that telephone conversation.

Q Thank you. I have just --

A And because I would be no part of it. I hadn't signed anything, I hadn't committed myself to any number of dollars and if somebody can show me that particular original document, I will show you that I hadn't signed it. I still want to know why I am in here because I don't have any part in this litigation and never did.

You yourself stated to me you recognized that I have no part of the litigation. I am talking to Mr. --

Q During your --

A -- Jensen --

Q -- testimony this afternoon you referred to a yellow sheet that you have in front of you.

That is all.

THE COURT: All right, we will take a ten-minute recess.

[Recess.]

MR. WARREN: Your Honor, the letter directed to Mr. Pepper from Mr. Unger which is identified in Mr. Eberle's deposition at Page 63 I believe refers to Exhibit BB for the purposes of the deposition. Copies of similar letters like this were sent to shareholders and we would like to offer this in evidence at this time.

MR. UIHLEIN: I believe it is already in evidence, your Honor.

MR. WARREN: Our record doesn't show it. There were several letters directed to shareholders.

MR. UIHLEIN: Exhibit JJJ, I believe, your Honor.

MR. JENSEN: From Mr. Pepper to Mrs. Arlinghaus --

MR. UIHLEIN: It is in, your Honor,

MR. WARREN: That is fine.

We would like now to go to the deposition of Steven Weil starting at Page 3, Line 7.

papers. He had signed some documents for them. I don't know what they were, Mr. Jensen.

Q Did Mr. Pepper say anything else or did you say anything else during that conversation that you recall now?

A No. There were other conversations after that.

Q Let me ask you next --

A [continuing] I don't know if I am giving them to you in the right chronological order. I am trying to.

Q It is understood that you had a number of conversations that day and you may not be able to pinpoint a particular conversation to a particular time; is that what you are saying?

A Yes.

Q But in substance, you are telling us what occurred during one of the conversations that day; is that so?

A Yes. I am trying to relate them.

That is all we have from the Weil deposition.

MR. UIHLEIN: Continuing right on, Page 58, Line 11:

Q Did you have a subsequent conversation with Mr. Unger on that day?

A Yes, I did.

Q Would you tell us about that next.

A They had everybody there at Modern Talking Picture, and Unger finally said okay, he says, 'Tell Pepper that we will pay him $75,000, providing that he turns over every single document, that we do get his resignations.'

He said, 'As a matter of fact, it wouldn't matter if we paid him 100; I have got to get his settlement and his release. We could even agree to settle for $100,000, because after I get all the papers, we have no intention of paying him anyway.' And I related to Mr. Pepper, I said, 'If I tell him he could have $100,000 now he is going to wonder why. Let me tell him 75.'

I related that to Mr. Pepper and he accepted the $75,000 settlement.

Q Have you told us all you recall about the conversation with Mr. Unger?

A He said that they had to have the settlement that day, had to get it, and when I related it to Mr. Pepper, he accepted the $75,000.

I told him that they had to get it that day.

He had to go down to his office or his lawyer's office or the bank vault to get some things out to deliver to them.

They were going to draw a settlement agreement immediately, within the half hour, so that they could close.

Page 11, Line 8:

Q When did you first meet or speak with Sidney Pepper?

A Mr. Shapiro introduced him to me when we got into the Modern Teleservice deal.

He was the attorney representing -- again, this is to the best of my recollection; it was a number of years ago, Mr. Jensen.

Q Sure, we understand that.

A The Estate, and I believe he also was counsel to the company. I might be incorrect on one of those.

Q When did you first speak to Mr. Pepper about the possible of Modern Talking Picture Service?

A If I said sometime in February or early March, I couldn't be far off, but we were into the Modern Teleservice deal at that time that I learned about Modern Talking Picture.

Q Do you remember your first conversation with Mr. Pepper about this?

A I really don't, Mr. Jensen.

Q Do you remember having conversations with Mr. Pepper about the possible purchase --

A Yes, I do.

Q -- of Modern Talking Picture?

A Yes, I do.

Q Can you approximate how many conversations you had with Mr. Pepper about that?

A There were several; that's for sure. I couldn't tell you how many precisely.

Q I take it you can't distinguish one from the other?

A I remember, we had a meeting -- we had a breakfast meeting -- we had meetings prior to that.

I would say at least six or seven, possibly more.

Page 15, Line 21:

Q Do you remember anything more about your conversation with Mr. Pepper on this occasion?

A Yes. I had a number of clients that I wanted to show it to, but one, in particular, and he would not allow me to show it to the client until I first got him the annual report on the client, until he was certain that he thought he had the cash or could come up with some money, and he wanted to approve the client before I even showed it to him.

He gave me a hard time on it; I remember that. No offense meant, gentlemen.

But he finally did agree to allow me to show it.

Page 23, Line 23:

Q I think it would be simpler for you just to limit

yourself to conversations or correspondence that you remember, directly with Mr. Pepper.

A I think Mr. Sonderling, at one point, authorized me to make an offer for Modern Talking Picture. He decided that he definitely wants to go ahead with it.

Q Do you recall when that was done?

A The only thing I recall, I think it was on the first day of Spring, oddly enough, or just about when -- yes, I do recall, because we finally came up with a concrete offer. I think it was the first day of Spring.

Q I show you now a copy of a document that was marked Exhibit DDD on Mr. Pepper's deposition, and I ask you whether that refreshes your recollection as to when that offer was made.

A Yes, it does.

Q Do you recall seeing that letter?

A Yes, I recall seeing that letter. Spring was the next day. Mr. Sonderling --

Page 25, Line 13:

Q Were you with Mr. Sonderling when he composed this letter?

A If my memory serves me correctly, Mr. Sonderling and I composed the letter in New York.

I think he, basically, wrote it out in longhand,

and then he went to Chicago. I am almost positive that he went to Chicago, where he was going to complete it on the plane, clean it up a little bit. He was going to type it and then put it on the next flight back to me and I was either going to either pick it up at the airport or they were going to deliver it to me by special delivery.

Q Did you do so?

A Yes.

Q What did you do with that letter after you picked it up?

A No. You see, that letter was on the 20th. I don't think I picked it up until the evening of the 20th or the 21st, so I didn't get that letter on the 20th, Mr. Jensen.

Q I didn't mean to imply that. What I have asked you now is: What did you do with the letter, which is marked DDD, when you picked it up, whenever that was?

A Mr. Sonderling instructed me, to the best of my recollection, to deliverit to Modern Talking Picture. I think I delivered it to Mr. Oard.

Q When did you do that?

A The next day, as soon as I got it.

Q The next day after you received it?

A No. The day I received it. It wasn't on the 20th. Let's see. Spring is March 21st; it was March 21st.

Q Were there several copies delivered to you of this letter?

A Yes. There was either several copies delivered or I might have made Xerox copies on my machine, but the original one, I delivered over.

Q To Mr. Oard?

A To Mr. Oard or Mr. Lenz; to one of those gentlemen.

I don't want to say Mr. Oard, because perhaps I gave it to Mr. Lenz.

Q It isn't clear to you whether it was Lenz or Oard?

A No, but I delivered it over to Modern Talking Picture, and Mr. Sonderling was also going to mail them one, as well, and he was going to mail one to the Estate and one to Mr. Pepper. He was going to put a couple of them in the mail, but the original one, I was supposed to get over to Modern Talking Picture.

In fact, I believe I gave Mr. Pepper a Xerox copy of that letter. In fact, I am almost certain that I gave him a Xerox copy of that letter.

Q However, you are not sure of the recipient of the original?

A No.

Q In order to possibly refresh your recollection on

this, I hand you what purports to be a portion of an official transcript of a Court record in a matter entitled Hough against Modern Talking Picture Service, Inc.

I ask you to read Pages 204 through 208 of what purports to be Mr. Sonderling's testimony in that proceeding. I ask you to read that.

I have a preliminary question though: Did you attend any part of the Court proceeding in the matter in the Delaware Chancery Court?

A I was down there one morning in Delaware.

Q So you are familiar with that proceeding?

A It was a long time ago.

Q I don't have to identify it for you.

A It was a number of years ago.

Q You need read only Pages 204 to 206 for the present purposes.

A I read the two pages.

Q I ask you now whether your recollection is refreshed as to who was the recipient of the original letter.

A I was. This is what Mr. Sonderling testified to.

Q And is your recollection refreshed as to whom you gave it to?

When I said 'recipient', I meant to say the ultimate recipient.

A Modern Talking Picture was the ultimate recipient. I hand-delivered it.

Q Is your recollection refreshed as to whom it was delivered to on behalf of Modern Talking Picture Service?

A Either Mr. Oard or Mr. Lenz; I don't remember.

Page 29, Line 21:

Q Would you continue your chronology of your dealings with Mr. Pepper in respect of the sale of Modern Talking Picture Service?

A I did give Mr. Pepper a copy of the letter.

Q Do you recall the place where you did?

A I seem to remember meeting Mr. Pepper and Mr. Eberle, and I think I gave Mr. Eberle a copy of the letter, as well, and I think we either had lunch or breakfast or something in one of the hotels. I just don't remember where.

Page 35, Line 19:

Q Do you recall when you first learned that Mr Pepper was claiming a lien on stock certificates?

A Yes. I had several meetings with Mr. Unger and with the management at Modern Talking Picture, and at one of those meetings, when they decided that they didn't want to do the Sonderling deal, that instead of them suing, themselves, they would have one of the stockholders do it for them, rather than have Mr. Lenz or Mr. Oard start the suit;

they got one of the stockholders.

After that suit down in Wilmington -- I believe Mr. Sonderling lost that suit -- I had several meetings with Unger and Lenz and Oard, and at that time, Sherman Unger told me that he is going to be buying the company himself with and for,you know, the present management, and that he knew that Sonderling didn't buy it; I wasn't going to get my commission; that he would still be willing to pay me a commission if I could help him either raise the money or -- I don't remember if Sonderling was going to appeal it.

He wanted me to try to talk him into not to appeal it, and it was around that time -- just a minute, it is coming back to me.

Q You tell us whether you have any present recollection as to when exactly it was that you were told, by whoever told you, that Mr. Pepper claimed a lien.

A Yes. There came a time when Sherman Unger told me that in order to do this deal where he would buy the company and arrange the financing for it, somehow or other, they would have to get a release from Sidney Pepper, because he put a lien on the books and records.

I don't know if it was on the stock certificates or if it was a lawyer's lien or what it was.

Page 61, Line 11:

He said, 'We are not going to pay him the 100 today because we don't have $100,000 cash in our pockets, but we will sign an agreement to pay him the 100. Because he has been such a pig about it, now he is going to get nothing. We are not going to pay him in any event. We just want to get the release, get the papers, so we could close it.'

I thought it would be foolish to offer him $100,000, because 'Why didn't you do this a week ago or two weeks ago.'

I said, 'I don't think you should offer him 100. Maybe he would be willing to take 75. It would be more realistic,' and he did accept 75.

Page 70, Line 20:

Q Was that transcript taken down with your knowledge, the transcript of the telephone conversation?

A Not to my knowledge.

Q It was not with your knowledge?

A No.

Q Is it apparently a correct transcript of what you said and what Mr. Unger said?

A Well, the transcript that I was showed today for the first time, that I read, was a transcript of a couple of calls, I think, just on Friday.

Q Do you remember the amount?

A No --

Q What was said by the stockholders?

A I guess it was said there -- they figured 20 or $25,000 .

The final figure that Mr. Pepper set was $75,000.

Q Do you recall the Sonderling offer? I show you Exhibit RR for identification. Is that your signature at the foot?

A Yes, sir, it is. I remember Mr. Pepper came in. I believe it was around noontime and asked me to sign this paper and I saw Mrs. Arlinghaus' name there, I signed it.

Q Did you read it?

A Yes, sir, and seeing that Mrs. Arlinghaus signed it, I signed it then.

Q You noted here that Mr. Pepper was to receive $100,000?

A Yes, sir.

Q Was it explained to you that that $100,000 was for his work in screening offers for the purchase of the stock or assets of Modern?

A Well, not really. I mean I was given this paper to sign and I read it and seeing that Mrs. Arlinghaus signed it, I did.

Q You made no inquiry about the basis for the $100,000?

A No, in fact I wasn't given that much time.

Q Did you know that Mr. Lenz was accustomed to refer various and sundry offers for the purchase of the assets of the stock of the company to Mr. Pepper?

A No, I had no idea of what Mr. Lenz was doing. I mean there were rumors about different things in the works but nothing concrete. I wasn't privy to any of that knowledge.

Q You were a substantial stockholder, weren't you?

A Yes, sir.

Q And you knew that there were various efforts to sell the company and offers received?

A Yes, sir.

Q You were familiar with Mr. Unger's offer?

A Yes, sir, eventually I was made aware of it.

Q You knew that it was in its alternative to buy the stock or to buy the assets?

A To buy the assets of the company, yes, sir.

Q At the meeting of June 7th did you hear Mr. Unger say in words or in substance that they couldn't work out a satisfactory arrangement with Mr. Pepper, he would go the asset route?

A I don't remember frankly. He may very well have.

Q Do you recall that that was part of his proposal?

A Yes, sir.

Q Did Mr. Pepper act as your attorney on occasion?

A He made out a will for me years ago.

Q Any other legal services that he rendered for you?

A No.

Q How much did you pay him?

A He didn't charge anything, seeing that he was the company attorney.

Q Did you have an attorney at the Jun 7th meeting?

A No, sir, I didn't. I didn't know it would be necessary.

Q Was Mr. Kelly your attorney at that time?

A No.

Q What else do you recall about the June 7th meeting?

A Well, eventually later in the afternoon, evidently Mr. Pepper and Mr. Unger came to some kind of an agreement and the figure that he quoted was at that time $75,000 for the release of the company books and the stock he was holding.

At that time there was a paper drawn up which we signed in all good faith.

Q Was there any discussion or suggestions by Mr.

Unger that you should go ahead and sign it because you won't have to pay Mr. Pepper anyhow?

A No, there was nothing said like that.

Q Was there any discussion about revoking the agreement and the assignment?

A No, sir, there wasn't.

Q When did that first come up?

A A couple of days after, I imagine; a couple of days after the incidents.

Q You mean after June 7th?

A Yes, sir.

Page 23, Line 2:

Q Did you read this agreement yourself before you signed it?

A Yes, sir. We were all given a copy to read.

Q Were you given a copy to keep after it was signed?

A No.

Q Do you recall this paragraph 6, 'Stockholders also warrant and represent that they are executing this agreement and the assignment of the $75,000 of proceeds of their own free will in the presence of each other and Attorney William E. Kelly, Esquire, who is present at the execution of this agreement'?

A Yes, sir, and we all signed in good faith.

Q I show you a copy of a document entitled Counter Assignment and ask you if that is your signature.

A Yes, sir, that is my signature.

Q June 7th was a Friday, was it not?

A Yes, sir, it was.

Q Who was present when you signed this agreement 41?

A I don't remember but I imagine all the stockholders were given a copy of that. Whether we signed it in the presence of one another, I don't remember.

Q Who gave it to you?

A I think Mr. Lenz did. I am not sure.

Q Was there a meeting when all of you signed together?

A That I don't remember whether we signed it together or individually. I really don't recall.

Q Who actually drafted it, did you type it?

A I have no idea who drafted it.

Q Did you have the advice of counsel?

A No.

Q Any attorney advise you or any of the other stockholders?

A I didn't have any attorney and evidently -- I mean Mr. Lenz and probably Mrs. Arlinghaus probably discussed

Q Did she have headphones on to pick up notes from the telephone?

A I imagine she was, yes.

Q Was she recording the conversation between Mr. Unger and somebody on the outside?

A I think she was, yes, sir. Also recording any conversation that Mr. Unger had between Lenz. I don't know just what here duties were, frankly.

Q Then Mr. Unger would report to the group the talks that he had?

A The talks that he had with Mr. Pepper, yes, sir, or his attorney. I don't know which.

Page 25, Line 25:

Q To whom did you deliver Exhibit 41 after you signed it?

A I imagine it must have been Mr. Lenz or one of the other officers in the company.

Q What did you ask him to do with it?

A Whatever was necessary. I don't know the legal procedure, frankly.

Q Was this discussed at all with Mr. Unger?

A Not in my presence, it wasn't.

Q Was Mr. Unger quoted to you by Mr. Lenz or other stockholders?

A In what way, sir?

Q As to what was necessary in order to avoid paying Mr. Pepper.

A No. He just said that some action would be taken. What it was, I don't know.

Page 29, Line 20:

Q How much did you pay for your stock in Modern?

A I think it was $1 a share. That was in 1937.

Q How many shares did you buy?

A 350 when we started the company.

Q How many shares or when did you acquire the remainder of your holding of 8,700 shares?

A That was given to me in lieu of dividends. Instead of dividends I received additional stock.

Q That was over the years from 1937?

A Until Mr. Arlinghaus passed away.

Q Until June 30, 1968?

A It was around 1964 when Mr. Arlinghaus passed away.

Page 31, Line 2:

Q Your original purchase was back in 1937 was along with some of the other employees of the company, was it not?

A There were only seven of us at that time that started the company.

THE COURT: Sustained. I am not going to receive a whole record from another case in this case.

MR. WARREN: May we put in and draw attention to the important points in it?

THE COURT: No, you may not draw anything from it. I can't accept the record from some other case before another judge or leave the defendants or your adversaries here, whatever they are, to wonder about what you will pick and choose from some other record and use it against him here. That is not a permissible procedure and the objection is sustained, in full.

MR. WARREN: Thank you very much.

In that case, your Honor, thank you for your patience and the cross-claimants rest.

MR. UIHLEIN: We have more depositions to read.

THE COURT: All right.

MR. UIHLEIN: Deposition of Rosalie M. Arlinghaus, page 12, line 2:

Q What did you say to Mr. Pepper when he informed you about the offer of Sonderling?

A It was the only offer that I personally, in dollars and cents, knew about, or that had been brought to my attention and he was to pursue it.

Q You told him to pursue it?

A Through the officers and management of Modern Talking Pictures Service.

Q In other words, you directed him to pursue it, this offer of Sonderling's, is that correct?

A Yes.

Page 44, line 22:

Q After that luncheon date, after Mr. Unger left on that luncheon meeting on March 28, 1968, did you have any conversations with Mr.Pepper requesting him to follow up with the Unger proposal?

A I do not recall that I did, sir.

Page 53, Line 5:

Q Do you recall it being at the offices of Modern on the morning of June 7, 1968?

A Yes.

Q Who else was present at the time?

A Mr. Carl Lenz, Mr. William Oard and the stockholders of Modern Talking Picture Service.

Q Was Mr. Sherman Unger present?

A Yes, and Mr. Kelly, Mr. William Kelly of Casey, Lane and Mittendorf, Mr. Dale Hagan and the next gentleman's name was Beimfohr.

Q Who is he?

A Of the firm of Casey, Lane and Mittendorf.

20 arcg " W. Kelly"

9, Line 4:

Mr. ROSEN: Will you mark this as Defendant's Exhibit 2 for identification , please.

Q I show you Defendant's Exhibit 2, and ask you if you recall reading that prior to the changes inscribed thereon?

A Yes; I seem to recall seeing this particular document or a copy of the original of it on that particular afternoon.

Q Do you recall a discussion concerning the contents of Defendant's Exhibit 2 whereby you requested certain changes on the purported agreement?

A Well, I have a recollection of such a meeting.

When you put it in terms of "requesting changes", I think I took a stronger position than that. I think I refused to allow certain of the statements to be in any agreement that would be executed.

Q In other words, you requested that certain portions of this agreement be changed?

MR. JENSEN: That's not a fair characterization of what Mr. Kelly said.

A I think I have just given you the answer.

Q Well, your answer, Mr. Kelly, --

Did you request any changes during the meeting

between myself and Mr.Unger of any of the clauses that were typed in on this Defendant's Exhibit 2?

A The way you phrase the question I would say, no, I didn't request any changes.

I refused to have my client sign any agreement in the form which you presented it.

Q Did you have any discussion then with Mr. Rosen, in the presence of Mr. Unger, concerning what clauses you did not want in there and which clauses you did want in there?

A Yes.

Page 12, Line 10:

Q Do you recall what was said at the original, the first meeting between the three of us, that is, Mr. Unger, you and myself?

A I would have to say I don't remember the details of what was said. I think Mr. Unger did a good bit of the talking. I think I indicated what my position was with respect to some of the paragraphs that I would not allow my client to sign and I think, in general, you accepted that position, but I can't be any more specific than that.

96

Page 13, Line 22:

Q I show you now Defendant's Exhibit 1, and ask you whether you read that thoroughly before it was

submitted to any of your clients for signature?

A Yes, I read it and we worked on it.

It seems to me there were some revisions that were accomplished on the typewriter there at the office, if I am not mistaken, all of which occurred before it was submitted to the signatories.

Page 15, Line 6:

Q Did you personally deliver Defendant's Exhibit 1, the various copies there, to your clients for signature?

A Oh, yes. I supervised the signature of that document and its various copies.

Page 16, Line 14:

Q With reference to Defendant's Exhibit 1, do you recognize the signatures of your various clients, and I refer to both the signatures on the agreement and on the annexed assignment?

A I can't say that I recognize them, but I recognize the document, and all of the signatures were placed on there under my general supervision and while I was present.

Page 28, Line 18:

Q Do you recall any conversations that Mr. Pepper may have had with your clients, in your presence, pertaining to Defendant's Exhibit 1?

A I don't recall Mr. Pepper having any discussions with any of my clients, the signatories to that agreement, with respect to Defendant's Exhibit 1.

Q In fact, prior to the execution of the Defendant's Exhibit 1, your clients and Mr. Pepper were in separate rooms and not together, is that correct?

A I believe that's correct, and I don't believe that even afterwards they met. I may be wrong. There were a number of people there, so I'm not sure of it.

Page 30, Line 22:

Q Upon the execution of Defendant's Exhibit 1, did you receive all of the papers and stock certificates referred to therein from Mr. Pepper?

A Well, Mr. Pepper turned over a number of papers and I didn't attend to the details of counting those certificates. I believe Mr. Vickers reviewed them.

My understanding was, we got all of the certificates and papers from Mr. Pepper, although I, personally, couldn't give you an answer on that point.

A And after Mr. Pepper delivered the papers and stock certificates pursuant to Defendant's Exhibit 1, did the stockholders, your clients, consummate their transaction on the sale of their stock with the Sherman Unger group?

A Yes, I believe so.

24 arcg "W. Kelly"

Q Do you recall the date when that was consummated?

A It's difficult to say, because it really wasn't something that was necessarily -- that necessarily involved the law firm.

The stock was to be delivered in accordance with a tender offer, and when exactly that was, completed by all of the stockholders, I am unable to say, except, as I said before, we got the stock, Mrs. Arlinghaus' stock, in various capacities from Mr. Pepper and then procedures were put in motion to put that stock into the depository in compliance with the tender offer.

Q You also got the various corporate papers that were referred?

A Yes, I believe we got the papers.

Q Do you recall subsequent to the execution of Defendant's Exhibit 1 that various of your clients, by means of telegrams or letters, notified Sherman Unger or his agent of their withdrawing their assignment dated June 7, 1968 attached to Defendant's Exhibit 1?

A I believe there were communications sent to Mr. Unger or to the bank in question. I am not sure to whom they were addressed.

Q Do you recall what the communications said?

A I'd have to see the communications themselves.

Q Were the communications sent under your direction?

A I would have to say they were sent under my very general direction.

I don't remember what I was doing that following week and there were other matters that I was undoubtedly attending to.

Whether I prepared them or whether somebody else in my office prepared them, I am just unable to say.

Q But it was prepared by your office?

A Not necessarily all of them. I think some of them were and, certainly Mrs. Arlinghaus' was handled by our office.

Q How long after June 7, 1968 were they prepared?

A Again, I have to look at the file of the papers to see when they were prepared.

Q I might be able to help you on that.

MR. ROSEN: Let the record show I am exhibiting to Mr. Kelly various telegrams and letters from the signatories of the Defendant's Exhibit 1, in which they purport to withdraw the assignment contained in Defendant's Exhibit 1.

A Yes; I have these various papers you have described in front of me now. What's your question?

26 arcg "W. Kelly" "Lenz"

(Question read.)

A (Continuing) The telegram has a date of June 13, one of them; June 17 on another one. There is a counter-assignment dated June 12, 1968.

I would say within a few days of the June 7 meeting and within that next week.

Page 34, line 25:

Q At any time prior to June 8, 1968, did you represent Mr. Eberle or did your firm represent Mr. Eberle?

A No. I don't really believe we ever represented Mr. Eberle, although Mr. Eberle, it seems to me, was in communication with Mrs. Arlinghaus, but I don't believe we represented Mr. Eberle.

I might also add, I believe Mr. Eberle was in favor of some of the things that Mrs. Arlinghaus was doing, but, again, I don't believe my representation was of Mr. Eberle.

That is all on that one, sir.

Next is the deposition of Carl H. Lenz, page 4, line 6:

Q Did there come a time when Modern was, in effect, on the market for sale, either by way of assets or stock?

MR. METSCH: I think the question is a little vague

Blt.97
(cont.)

1 arsr "Lenz"

Q Do you recall the names of the concerns that you referred to here?

A I believe I referred him to Unger and Associates, who were interested buyers. There may be others that at this moment I --

Q Sonderling?

A No, I knew nothing of Sonderling's interest. I learned that from Mr. Pepper.

Q Bangor Punta Corporation? I read off a list. Do you recall that outfit?

A Bangor Punta?

Q That's right.

A Yes, they were, they contacted me at the instructions of one of our directors, a Mr. Milton Lewis.

Q Bear, Stearns & Company, did you refer that to Mr. Pepper? Do you remember referring them to Mr. Pepper?

A Bear, Stearns? I don't recall, truthfully. Mr. Pepper had quite a number of people he spoke to and at his suggestion they would contact me, and it's very difficult now to determine after these years who originated the initial contact.

Q I ask you the same question about Boise-Cascade Corporation.

A I don't remember anything specifically about

asset basis?

A It had to be in that area, I guess, yes.

Page 40, Line 7:

Q Do you remember the letter Mr. Oard wrote to a number of stockholders, don't you?

A Yes, I do.

Q And you approved of that letter?

A Yes.

Q And that supported the Unger offer?

A Yes.

Bottom of Page 40, Line 23:

Q Was it implicit or definite in your discussions with Mr. Unger that you would be permitted to acquire an interest, a stock interest in Modern?

A It was implied, yes.

Q It was implied at the time the Unger offer was under consideration?

A Well, I am not positive on that date any more.

Q Well, now, did you acquire some stock?

A Subsequently, yes.

Q How long after?

A Several months, I believe. I have to check.

Page 42, Line 4:

Q I think you first met Mr. Unger the end of 1967?

A Well, I think I mentioned that it was in that area, in 1967 or early 1968, I am not sure.

Q Did you not discuss the sale of the business to Mr. Unger and his group shortly after you met him?

A Yes. He expressed an interest as to acquiring Modern Talking Picture Service, yes, sir, early in 1968, I believe.

98 Q Did you, Mr. Lenz, understand that a provision would be made for him to acquire a stock interest in the enterprise of Modern?

A Yes, it was, but I can't orient to a relatively firm time. Some time in my discussions with Unger it was discussed, yes.

Q That is Pepper Exhibit 32 and also Exhibit VV.

A Yes, I believe it was before that date.

Q Did not Mr. Unger offer the same inducement to other members of the management team that he had implicitly offered to you?

A It was indicated by Mr. Unger that he would consider in behalf of his company Modern Media, Incorporated, a collective purchase of the minority holding in the company by the management team of Modern Talking Picture Service.

Q That included Mr. DelCoro and Mr. Kater, Mr. Kincheloe, Mr. Rogers and Mr. Vickers?

A What's the question you are seeking to know?

Q The question was whether the management team included those whose names I have just mentioned.

A Yes, at that time.

Q When the stock was made available, did they all participate?

A All but Mr. Vickers.

Q Mr. Hough?

A No.

Q Were each of the management team given an employment contract?

A No. It was only two Prevailing work contracts: One for Mr. MacCallum and one for myself.

Page 50, Line 6:

Q Mr. Lenz, I show you a letter you produced dated May 10, 1968 addressed to you by Mr. Unger and ask you if you can identify that. Is that the offer substantially as it was accepted?

A Substantially, I believe so.

Page 51:

THE WITNESS: Without verifying those numbers, I understand that the closing transaction gave the stockholders $27 a share for 94,500 shares, and that would appear to be ballpark.

on approximately the same terms upon which he had purchased it from the present owners.

The management was not in a position to negotiate the sale of the company since it owned no part of the company, with the exception that I have noted, so that it was not in a position to accept or reject or express preference as to the terms, price, or manner of payment.

Page 16, Line 25, this is part of an answer:

It seems to me that I first heard of Sonderling on April 5th, which I believe was the Friday that preceded this meeting. I believe April 5th was a Friday and this would have been a Monday.

And that would have been the date that Mr. Sonderling visited our office, to which I referred earlier and, well, that's the answer to the question, I guess.

Q You knew, of course, that the directors had approved the sale to Sonderling on April 8th?

A Yes, I did, because I was there.

Page 26, Line 3:

Q I show you a letter dated May 10,1968 from you to Howard E. Eberle, with a notation of a dozen or so names to which carbon copies were sent. That's your letter?

A Yes.

Page 27, Line 4:

16 arsr "Oard"

Q Did you address this letter of May 10, 1968 separately to each of the names listed on Page 2

A Yes.

Page 28, Line 3:

Q What other members of management besides you acquired stock in Modern after the Unger acquisition?

A Mr. Lenz, Mr.Kater, Mr. Kincheloe, Mr. Rogers, Mr. McPoland, Mr. Renko and Mr. DelCoro.

Q When did they acquire that stock; at the same time?

A At the same time I did.

Q That you say was in December 1968?

A Right.

Q Same price?

A Yes.

Q When was this stock acquisition first broached to them by Mr. Unger?

A I have already told you that Mr. Unger had discussed the prospect of making equity available to management during the Spring of 1968, provided he was successful in acquiring the company and that, that such equity would be available on substantially the same terms that he paid, he and his associates had paid.

During the late summer or early Fall of 1968, the

A Yes, I did see it.

Q Were you there most of the day?

A Yes.

Q Did you assist in any way or endeavor to solve the problem of Mr. Pepper's claim for legal services; retention of records --

A Yes.

Q Stock certificates?

A Yes.

Q What part did you take in that?

A My recollection is that the only active part that I took in it was a luncheon that I had with Mr. Pepper some time prior to June 7th at which I suggested that if he were to reduce his claim to perhaps $25,000 that the shareholders might very well be inclined to go along with him on a pro rata basis.

I did this on my own hook or in my own -- well, that's fine. I had no firm reason to feel that they would. It was simply an impression that I had.

Mr. Pepper had claimed a large amount, which I believe at one time went up to $116,000, and I had the feeling that the matter could be expedited if he would reduce his claim somewhat.

That is all on that one. That is the end of our

Exhibit 1-E

Excerpts of Transcript of Proceedings
in the Delaware Court of Chancery
(Hough v. MTPS, et al.) dated May 13, 1968

THE COURT: Mr. Anderson, gentlemen, good morning.

MR. ANDERSON: Your Honor, I would like to move the admission pro hac vice of A. Harry Becker, of the Wisconsin and District of Columbia Bar, who is associated with me in the representation of the Sonderling Company, not the Talking Pictures Company.

On Friday, I appeared on behalf of the Talking Pictures Company; this morning I am authorized to appear on behalf of the defendant Sonderling Company, and also on behalf of Mrs. Arlinghaus, both individually, as custodian, and as executor under the will of her late husband.

THE COURT: Mr. Becker is appearing only for Sonderling Company?

MR. ANDERSON: Yes.

THE COURT: You are admitted, Mr. Becker.

MR. CARPENTER: May it please the court, this is the time set aside for the hearing of the preliminary injunction application of Hough versus Modern Talking Pictures Service, Inc. We represent the plaintiff, Richard M. Hough.

Your Honor very kindly, in light of the very short time available, has given us permission to introduce oral testimony, and if the court please, I would like to proceed to do that now.

THE COURT: All right.

MR. CARPENTER: Mr. Anderson has asked if we could wait for a couple of minutes until Mr. Pepper reappears. He is going to make a phone call.

THE COURT: All right. You may swear the witness, Mr. Clerk.

WILLIAM OARD, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARPENTER:

Q Mr. Oard, would you please state your full name and present home address for the court and reporter?

A William Murray Oard. I live at 27 Canterbury Road, White Plains, New York.

Q What if any connection do you have with Modern Talking Pictures?

A I am vice president of operations, and a director of the corporation.

Q How long have you been associated with the corporation?

A Since August, 1948.

Q How long have you been a director of the corporation?

A Since approximately a year ago last December. The first meeting I attended was in May a year ago.

Q How long have you been an officer of the corporation?

A For approximately 8 years.

Q Could you tell us just in general terms something about the business of Modern Talking Pictures, and the nature of the corporation?

A Modern Talking Pictures is in the business of distributing public relations and educational motion pictures.

In distributing public relations films, we operate on behalf of large industrial corporations and trade associations who produce films as part of their public communication program, films to inform the public about their business, and to present themselves generally in a favorable light.

Acting for these corporations, we generate circulation, that is, we distribute their films at no charge to various kinds of audiences. We perform a service analogous to the service that magazines and television stations and other media provide in disseminating advertising and other sponsored information.

We also distribute educational motion pictures and related visual aids. In this operation we secure the rights to distribute copyrighted programs, copyrighted material, and we undertake to rent and sell these materials primarily to schools, but also to other interested users for training

and educational purposes.

Q Can you give us some idea of the size of your corporation? How many employees do you have?

A We have 300 employees.

Q Where are you located?

A Our headquarters office is in New York City. We have 19 branch offices throughout the United States and Canada. We have 14 dealers in the United States in various parts of the country, and we have affiliations with dealers in Western European countries and in Australia.

Q Do you know how many shares of the common stock of Modern Talking Pictures are outstanding now?

A Yes; 94,500.

Q Do you know approximately how many stockholders there are?

A Yes. There are about 10 stockholders. May I comment on that?

Q Yes.

A I believe that 52,670 shares are held by the Arlinghaus family under various accounts, one account being Mrs. Rosalie Arlinghaus, another being Mrs. Arlinghaus as executrix of her husband's estate, and then three accounts being Mrs. Arlinghaus as custodian for each of her three children.

A I am Mr. Oard.

Q And you were present in your capacity as a director?

A Right.

Q Was there also present a Mr. Lenz?

A Yes.

Q Who is he?

A Mr. Lenz is president of the corporation, and a director.

Q We have been talking about the meeting of April 8, 1968, and the persons who were present. I want to go back to the period before that meeting and, first of all, ask you when you first learned of a proposal made by Sonderling for the assets or stock of Modern Talking Pictures.

A On April 4, 1968, Mr. Lenz told me that --

MR. ANDERSON: I object to that as hearsay.

MR. CARPENTER: I am just establishing date of knowledge of the offer here. This is offered solely for establishing the date when he first learned of it, your Honor, and not for the purpose of establishing the truth of what Mr. Lenz told him.

MR. ANDERSON: All right.

BY MR. CARPENTER:

Q Don't go into the details of what he told you, Mr. Oard. We just want to know when he told you, and if it

related to this matter.

A On April 4 he told me that we were to meet with Mr. Sonderling on the following day to discuss his interest.

Q Did you in fact meet with Mr. Sonderling on the following day?

A Yes, we did.

Q Was there a further discussion on the following day?

A Yes, there was.

Q Now, on April 4 did you learn the details of the offer?

A No.

Q Did you learn the amount of the offer?

A No.

Q On April 5 when you met with Mr. Sonderling, who was present?

A Mr. Lenz and Mr.Vickers, our treasurer, Mr. Sonderling, Mr. Eberle, Mr. Pepper, and Mrs. Arlinghaus.

Q At that meeting what was the nature of the discussion?

A The discussion centered around Mr. Sonderling's interest in acquiring Modern Talking Pictures Service.

Q Did you or did anybody at that meeting inquire as to the amount of the offer?

A Yes. I asked Mr. Sonderling what price he proposed

to pay.

Q What was the response?

A Mr. Sonderling refused to answer my question.

Q Did Mr. Pepper tell you?

A No.

Q Did anyone tell you?

A No.

Q When did you first learn the amount which Sonderling proposed to pay?

A On April 8, 1968.

Q Was that at a board meeting?

A That's right.

Q Prior to the meeting of April 8, had you had any further discussions with Mr. Pepper concerning the Sonderling proposal?

A Other than those that I have referred to?

Q Other than April 4 and April 5?

A No.

Q At any time did anyone else disclose to you the price which Sonderling proposed to pay?

A No.

Q I am going to show you a letter dated March 20, 1968, addressed to the board of directors of Modern Talking Pictures, and ask you if you have ever seen that before.

A Yes.

Q Did you see that before the meeting on April 4, to which we have referred?

A No.

Q Did you see that on April 5, the meeting with Mr. Sonderling?

A No.

Q Did you see that on April 8, at the time of the board of directors' meeting?

A No.

Q When did you first see this letter?

A I'll have to give you an approximate answer. To the best of my recollection, it would have been the following week.

Q That is, the week after the board meeting?

A That's right.

Q Have you ever discussed that letter with Mr. Sonderling, the president of Sonderling Broadcasting Corporation?

A Yes.

Q Let me first ask you if you will tell us who Mr. Sonderling is, in general.

A Mr. Egmont Sonderling is president of Sonderling Broadcasting Corporation.

Q Did you first meet him on April 5, or had you met him before?

A I first met him on April 5.

Q When you discussed this letter with Mr. Sonderling did he acknowledge that he had sent it to the board of directors, or referred it in any way?

A I will have to answer that in a negative way, if I may. He didn't deny having sent it.

Q If you will look at that letter you will note that it is dated March 20, 1968, and refers to a specific price, namely, $2,800,000. When did you first hear of the $2,800,000?

A At the April 8 meeting of our board of directors.

MR. CARPENTER: May I offer this letter into evidence?

MR. ANDERSON: No objection.

THE COURT: Admitted as Plaintiff's Exhibit 1.

MR. CARPENTER: Your Honor, this is the letter which is attached to the complaint.

(Letter dated March 20, 1968, was received in evidence and marked Plaintiff's Exhibit No. 1.)

BY MR. CARPENTER:

Q Did you ever have occasion to see the response to that letter by any person, Mr. Oard?

A I saw a copy of a response to that letter.

Q Do you recall the date of that response?

A March 22.

Q Do you have a copy of that response?

A No.

Q Do you know who signed it?

A Yes, Mr. Pepper.

Q Can you tell us when you first saw a copy of that response?

A I believe it was last week.

Q Did you know on April 8 either that a written offer had been made by Sonderling dated March 20,1968, as indicated by Plaintiff's Exhibit 1, or that an answer to that offer had been made by Mr. Pepper on March 22, 1968?

A No.

Q In the period before April 8, 1968, had there been other offers made for the Modern Talking Pictures stock or assets, to your knowledge?

A Yes.

Q Can you tell us just generally what other offers were made, and then I am going to ask you more specifically about one or more of them.

A I was familiar with an offer -- you said before April 8?

Q About when was that?

A I believe it was in September.

Q In September of 1967?

A Yes.

Q What was his proposal to you?

A Mr. Pepper proposed that he and Mr. Lenz and Mr. Vickers, and I, acquire 40% of the stock of each shareholder, to be split 10% for Mr. Pepper and the remaining 30% among the three of us, at a price of $10 a share, and that we then endeavor to sell the corporation at a higher price, to enjoy a capital gain.

Q I don't think you have told us before who Mr. Vickers is. Who is Mr. Vickers?

A Mr. Vickers is treasurer and secretary of the corporation.

Q Is he a director?

A No.

Q Was he present at directors' meetings?

A Yes.

Q Was he present at the directors' meeting of April 8?

A Yes.

Q When Mr. Pepper proposed this to you did he refer to the fact that this was a proposition that had been made in

connection with another corporation?

A Yes.

Q What was the other corporation?

A Modern Teleservice.

Q Would you tell the court please what the relationship was between Modern Teleservice and Modern Talking Pictures?

A Modern Teleservice had at one time been a division of Modern Talking Pictures Service, and was spun off some years ago, and I don't remember the year. It shared common ownership for the most part. A number of our directors were also directors of Teleservice.

Q Is this a corporation which you have earlier described as being sold to Sonderling as a result of which Mrs. Arlinghaus and others obtained stock in Sonderling?

A That's correct.

Q What was the transaction which Mr. Pepper described to you with respect to the Modern Teleservice stock which was similar to the proposition which he made to you with respect to the Modern Talking Pictures stock?

A Mr. Pepper said that he had persuaded the shareholders of Modern Teleservice, all but one, to sell 40% of their shares, with 10% going to Mr. Pepper and the remaining 30% split between Mr. Ritenour and Mr. Lipsky, who are, respectively, president and executive vice president of Modern

Teleservice.

Mr. Pepper stated that the price was $10 a share that had been paid, with $3 paid at the time of the transaction and the remainder to be paid within a year or after prior sale of the stock.

Mr. Pepper said that Mr. McCallum, who was a shareholder in Teleservice, had refused to sell 40% of his shares but had agreed to sell 30% to Mr. Ritenour and Mr. Lipsky for $10 a share. He had simply refused to sell any to Mr. Pepper.

Q Do you know how much Pepper, Ritenour, and Lipsky received in value in Sonderling stock for the Modern Talking Pictures shares for which they paid $10?

A Excuse me; you mean Modern Teleservice?

Q Yes, Modern Teleservice shares, for which they paid $10.

A I don't know.

Q At the time Mr. Pepper made the proposition to you that 40% of the stock be acquired from all the stockholders of Modern Talking Pictures, to be distributed among you three, was there included any proposition that part of that stock would go to him?

A Mr. Pepper had proposed that 10% of the outstanding shares would go to him; that is, 25% of the 40%.

Q At that time, I think you have already mentioned, he was attorney for Mrs. Arlinghaus, one of the stockholders who had contributed to this?

A That's correct.

Q Was there also an estate that still held stock that was to contribute to this?

A Yes.

Q Was Mr. Pepper the attorney for the estate?

A He said he was.

Q Were there also custodianships for minor children that were to contribute to this stock?

A Yes.

Q Was Mr. Pepper attorney for them?

A He said he was.

Q So that under this proposal, in effect, clients of Mr. Pepper would be contributing stock in a corporation which Mr. Pepper was attorney for, to you and others, and to Mr. Pepper, at a $10 rate, to be resold at a higher rate?

A That is correct.

Q You have mentioned that this was to be at $10 a share. Did you in your discussions with Mr. Unger ever reach a point where he mentioned a price per share as a firm offer from him?

A Mr. Unger discussed with me a price of $21 per share.

Q When was this?

A This would have been in early March, 1968.

Q Do you recall that a meeting of the board of directors took place on or about March 22, 1968?

A Yes, on March 22.

Q At that meeting was there any discussion of the offer which had been made by Mr. Unger?

A Yes.

Q What was that discussion?

A Mr. McCallum reported that he had previously that week -- I think the 22nd was a Friday -- that he had previously that week met with Mr. Unger and one of his associates in Cincinnati, and that Mr. Unger had offered $21 a share, and that Mr. McCallum spoke very highly of Mr. Unger and his associates and stated that he had spoken to his daughter, Mr. McCallum's daughter, who holds some shares, and that both he and she were agreeable to selling their shares at that price, and that he further recommended that other shareholders give careful consideration to that.

Q At that time what was the status of your discussions with Mr. Pepper with respect to the proposition he made the previous year that you acquire 40% of the stock, to be divided among the group?

A We hadn't talked about it for some time.

Q What had been your response to him?

A We refused it.

Q On March 22, when Mr. McCallum spoke of the Unger offer, were the other directors present?

A Yes.

Q Was Mr. Pepper present?

A Yes, Mr. Pepper was present. May I say that Mr. Lange was not present.

Q All the other directors were present?

A All the other directors were present.

Q Did Mr. Pepper advise the board of directors at that time that he had received a written proposal from Sonderling dated March 20?

A No.

Q Did Mr. Pepper at the board meeting on March 22 advise the board of directors that he had already responded to the written proposal from Sonderling?

A No.

Q You have already told us about the meetings on April 4, when you first learned of the Sonderling proposal, and April 5, when you met with Mr. Sonderling and certain others. Were there any further developments with respect to the Sonderling offer prior to April 8, the time of the board meeting, that you know of?

Q Was it thereafter read back to Mr. Pepper and the balance of the meeting?

A Yes.

Q Now I am going to refer you to the second page of these draft minutes and ask you whether or not the resolution referred to there is the resolution which Mr. Pepper made which Mr. Vickers transcribed and which Mr. Vickers thereafter read back to Mr. Pepper and the balance of the directors?

(Pause.)

A Yes.

MR. CARPENTER: Your Honor, I have delivered to Mr. Anderson a copy of this document, and if he has no objection I would like to deliver a copy to the court, because I am going to ask Mr. Oard to read this resolution and then I am going to ask him several questions about it.

Do you have any objection, Mr. Anderson?

MR. ANDERSON: I don't have any objection.

If the court please, I have a copy of what we will contend is the official minutes of the meeting. I haven't had a chance to peruse this. I don't know that there is too much difference between the two, if any.

MR. CARPENTER: Your Honor, there is going to be some testimony about those official minutes in a short while, and that might be a more appropriate time to introduce them.

These are the minutes prepared by the secretary of the corporation for approval, but they are tentative in form, and I am really referring to them now solely for the purpose of getting this resolution into the record as a part of the complaint.

MR. ANDERSON: Are these tentative minutes, minutes that were circulated to all of the directors by Mr. Vickers, or just his own notes?

MR. CARPENTER: Mr. Vickers is here, and he is going to testify that he took these minutes as notes of the meeting, and that he submitted them thereafter to Mr. Pepper, and he will also describe what differences there were. I am really now solely concentrating on this resolution.

MR. ANDERSON: All right.

BY MR. CARPENTER:

Q Before I ask you to read this, Mr. Oard, I would like to ask you who proposed this second resolution?

A Mr. Pepper.

Q Could you read the resolution which he proposed and which was transcribed and thereafter read back to the meeting?

A (Reading)

"Mr. Pepper proposed the following resolution:

"'Specifically, to authorize the sale by the corporation to Sonderling Broadcasting Corporation,

with approval of Mr. Eberle and Mr. Cox, of substantially all the assets and properties of the corporation except the sum of $10,000 to be retained for the expenses of the liquidation and dissolution of the corporation and to the extent not used turned over to Sonderling Broadcasting Corporation. In consideration of:

1. The assumption by Sonderling Broadcasting Corporation of all liabilities, obligations, contracts and commitments of this corporation.

2. The payment before May 15, 1968, of $2,800,000, of which an amount not to exceed 50% may be held in escrow in behalf of this corporation to January 2, 1969, to make good any damages to Sonderling Broadcasting Corporation by reason of any misrepresentation or breach of warranty in the contract of sale with respect to the assets, properties, liabilities, contracts, commitments of this corporation, and such other facts which counsel for Sonderling Broadcasting Corporation may request as a condition as to the making of such contract, and with $300,000 payable to Commonwealth Development Corporation of

Philadelphia for its services in bringing about such sale. Such above amount to be payable only if and when the consideration for such sale is received by the corporation, and with the understanding that Sidney Pepper, counsel and director for the corporation, is to make no charge to the corporation for his services herewith, but is to receive $100,000 commission from the Commonwealth Development Corporation, and with such further charges requested by counsel for Sonderling Broadcasting Corporation and acceptable to Mr. Eberle and Cox.'"

Q Was a vote taken on that resolution?

A Yes.

Q Did all of the directors vote on this resolution by Mr. Pepper?

A No.

Q Who did not vote?

A Mr. Pepper did not vote.

Q How did the other directors vote?

A Mr. Lenz and Mr. McCallum and I voted against; and the remaining four voting directors voted for the resolution.

Q Did Mr. Pepper thereafter propose a further resolution?

A Yes.

Q Is that also set forth in the draft which you have?

A Yes.

Q Would you please read that to us too?

A The next resolution:

"Mr. Pepper proposed Howard Eberle as a vice president and assistant secretary, to serve without compensation.

"2. Edmund H. Cox as a vice president and assistant secretary, to serve without compensation.

"3. Sidney Pepper as a vice president and assistant secretary, to serve without compensation."

Shall I continue?

Q Yes.

A "4. Propose that a new corporation be established and that the name be The F. H. Arlinghaus Corporation, or such name as proposed by S. Pepper.

"5. Authorize the corporation to withdraw from each of the present states in which they do business.

"6. Separate from the services of the corporation all employees of the corporation subject to the sale to Sonderling Broadcasting Corporation.

"7. Authorize Sidney Pepper and Edmund Cox to

sign checks on the company's bank account effective with the sale of assets to Sonderling Broadcasting Corporation.

"8. Authorize the company officers to take any actions and execute and distribute all documents required in connection with the sale to Sonderling Broadcasting Corporation and the company's liquidation which was previously authorized at this meeting."

Q Do you recall that these resolutions were made by Mr. Pepper?

A Yes, I do.

Q Now I want to return to the second resolution which you read, the one that starts, "Specifically to authorize the sale by the corporation to Sonderling Broadcasting Corporation."

I note first that there is a reference that this is to be with the approval of Mr. Eberle and Mr. Cox. I do not recall exactly what you said about Mr. Eberle, but did Mr. Eberle himself have interest in Sonderling Broadcasting at that time, to your knowledge?

A Yes.

Q How did that interest arise, Mr. Eberle's?

A Mr. Eberle was a shareholder in Modern Teleservice, whose shares were to be exchanged for Sonderling Broadcasting shares.

Q Insofar as Mr. Cox is concerned, I believe you have already described him as associated with Mr. Pepper, who is the attorney for Mrs. Arlinghaus, and who is also described here as receiving a $100,000 commission for this sale. Is that correct?

A That is correct.

Q I want to go down further in the resolution to Item 2, where there is reference to an amount not to exceed 50% which may be held in escrow to satisfy certain obligations which are described there.

The proposal here is for a sale at $2,800,000, and this particular provision provides for a holding in escrow of $1,400,000. On the following page there is also a reference to a deduction of $300,000, which is to be paid out, leaving $1,100,000 for distribution here.

Can I impose on you to do the arithmetic and tell us how much per share that would be, $1,100,000?

A Do you want it really accurately?

MR. ANDERSON: Your Honor, the price per share is a matter of calculation. I don't think we need this witness to do it. It is a matter of argument, really, that they are only going to get a certain amount of cash immediately and the balance is going to be held back. It speaks for itself.

MR. CARPENTER: I think perhaps that is so, your Honor.

I will accept that, and if we can assume that this is part of the record in this case, we will make the calculation later and submit it to the court.

THE COURT: All right.

BY MR. CARPENTER:

Q In any event, can we agree that this amount would be very substantially less than $21 a share?

A Yes.

Q Did you know, or do you now know, the approximate book value of the stock of Modern Talking Pictures as of April 8, 1968?

A Yes.

Q What was the book value?

A Approximately $16 a share.

Q Do you know whether or not $1,100,000 would be more or less than the book value?

A It would be less than the book value.

Q Do you know by how much, approximately?

A About $600,000 or $500,000.

Q Going on a little further in this resolution, there is a statement here that the escrow funds are to be applied to damages to Sonderling Broadcasting Corporation by virtue of a misrepresentation or breach of warranty in the contract of sale. What were the representations, and what were the

warranties in the contract of sale referred to in this resolution?

A I don't know. I was not shown a contract of sale.

Q Was a contract of sale shown to any of the directors, to your knowledge?

A No.

Q Have you to this day seen a contract of sale?

A No.

Q Was there a description of a contract of sale?

A No.

Q Was it then left up to Mr. Eberle and Mr. Cox to prepare a contract of sale, or to review and approve a contract of sale?

A It was left up to them to review and approve.

Q And they are the two directors whom you have already described as Mr. Eberle having an interest in Sonderling, and Mr. Cox being associated with Pepper, who was to receive $100,000 commission, plus also having an interest in Sonderling, is that correct?

A Yes.

Q Now I want to go on down further in the resolution three lines from the bottom, where, in addition to the assignment of escrow funds to damages arising by reason of any misrepresentation, there is the statement, "and such other

facts which counsel for Sonderling Broadcasting Corporation may request as a condition as to the making of such contract."

What other facts did Mr. Pepper describe to you, or did you know of, as of April 8, when this resolution was presented to the board of directors?

A None.

Q Had you met counsel for Sonderling Broadcasting Corporation?

A No.

Q Was this detail, such other facts, also then left up to Mr. Eberle and Mr. Cox?

A I believe so.

Q Now I want to go to the next page, where there is a reference to the payment of $300,000 by Modern Talking Pictures to Commonwealth Development Corporation. Who is Commonwealth Development Corporation?

A I don't know.

Q What is Mr. Pepper's connection with Commonwealth Development Corporation?

A I don't know.

Q Were the directors told who Commonwealth Development Corporation was?

A No.

Q Were the directors told how Commonwealth Development

Corporation became entitled to be paid $300,000, apart from what appears in this resolution?

A No.

Q There is a further statement down below that Mr. Pepper is to receive a $100,000 commission, to be paid out of the $300,000 going to Commonwealth Development Corporation. Were the directors told why Mr. Pepper was entitled to $100,000 as a result of this transaction?

A No.

Q Do you know why he is entitled to $100,000 as a result of this transaction, apart from the fact that it was voted on at the directors' meeting?

A No.

Q There is under that a further statement, and I am still on what is the third page of this, that Modern Talking Pictures is to pay such further charges requested by counsel for Sonderling Broadcasting Corporation, and acceptable to Mr. Eberle and Mr. Cox. What further charges were discussed at the board meeting?

A None.

MR. ANDERSON: Pardon me. I don't think the word "pay" is in there.

THE WITNESS: No, it doesn't say pay.

MR. CARPENTER: It is a little hard, without reading

the entire resolution, to get back to this, your Honor.

Your Honor will recall that at the top it states that $300,000 is payable to Commonwealth Development Corporation, and then it goes on to say this amount is payable only if and when consideration of such sale is received by the corporation. Then it says that Sidney Pepper is to receive $100,000 commission from Commonwealth Development Corporation. And then it goes on to say, "and with such further charges requested by counsel for Sonderling Broadcasting Corporation and acceptable to Mr.Eberle and Mr. Cox."

It is true it doesn't say it is to be paid, but I have understood that that was the intent of this.

MR. ANDERSON: There will be testimony on behalf of the defendants in this case that there is a misstatement in the notes, and the word should be "changes" and not "charges." That was the resolution that was passed.

MR. CARPENTER: Let me say parenthetically, your Honor, that if that is the case, if anything it will strengthen our position here because the court will note that the changes again are supervised by Mr. Eberle and Mr. Cox, and we again have the cat guarding the canary.

BY MR. CARPENTER:

Q Do you recall, Mr. Card, whether the reference was to further charges or to further changes?

A I wonder if I could, to answer that question, describe why I believe these are the correct notes?

Q Yes, please.

A Then I think it will answer your question. When the resolution was read it was written down by Mr. Vickers. I watched him write it down. He then read it back. I listened to him read it back. I made no notes of my own. What he read back agreed with what I remembered and what I saw him write down. Therefore I feel that this is correct. I can't tell you from my own memory if "charge" or "change" was the correct word.

Q Was Mr. Pepper present and did he listen or appear to listen when Mr. Vickers read back the notes?

A Yes.

Q Did he propose any additional changes at that time, in your presence?

A There was discussion between Mr. Pepper and Mr. Eberle and Mr. Vickers. Mr. Eberle was making notes while the resolution was read, but I didn't read his notes.

Q Of the directors who voted against the first and second resolution, and you have identified yourself and Mr. Lenz and Mr. McCallum, was there one, or were there more than one, who made any statement setting forth their reasons for voting against the resolution?

A Mr. McCallum made a number of statements.

Q Did you make any statement at that time in the board meeting?

A No.

Q Did Mr. Lenz?

A No.

Q At the conclusion of this meeting did any of the directors advise you, or advise the board generally, where they were going, and what they were about to do?

A Yes.

Q Who was it that spoke of this to you?

A Mr. Pepper announced that he and Mrs. Arlinghaus and Mr. Eberle were in a hurry because they had to go to New Jersey to close the transaction with Sonderling relating to Teleservice.

Q And that is the transaction which you have already referred to before?

A Right.

Q At the time of the vote on the resolutions which you have just described, what was the status of the Unger offer insofar as you know?

A I believe it was still open, as far as Mr. Unger was concerned.

Q Do you know with whom he was in contact, or with

Q And why is that?

A May I continue to answer?

Q Yes.

A I voted against it too because I simply had not had sufficient time to learn anything about Sonderling, or to talk with any of the Sonderling people to try to find out what their interest was in us.

Q At the time of the board meeting were you able to evaluate how much would be retained in escrow after all of the various claims were paid?

A No.

Q Was this a factor in your vote also?

A Yes.

MR. CARPENTER: I have no further questions, your Honor.

THE COURT: We will recess for ten minutes before the cross-examination.

(Brief recess.)

CROSS-EXAMINATION

BY MR. ANDERSON:

Q Mr. Oard, you and Mr. McCallum, I think you testified, and Mr. Lenz, were the directors that were opposed to this sale, is that correct?

MR. CARPENTER: I object to that because it is somewhat confusing. This was an offer to purchas stock. Mr. Oard was not a stockholder. So that an offer to purchase stock would not normally be presented to him.

Now, the board of directors would and should be kept advised of offers of this kind, though curiously they were not being kept advised, as it now develops. But the board of directors does not decide on the offer to purchase stock. That is the stockholders' decision.

THE COURT: But the question concerned whether or not any writing about this offer was offered to the board at that meeting, Mr. Carpenter. Do you object to that?

MR. CARPENTER: No.

THE COURT: All right; go ahead, Mr. Anderson.

BY MR. ANDERSON:

Q As Mr. Carpenter has pointed out, this was not an offer to buy assets but an offer to buy stock from certain stockholders, or all the stockholders?

A In all my conversations with Mr. Unger, he indicated that he wanted 100% of the stock.

Q So it was to buy stock from the stockholders and contingent upon acquiring all of the stock?

A This was what Mr. McCallum reported.

Q Did the officers, or any of you, to your knowledge,

have any understanding with Mr. Unger as to what your participation in this stock purchase was going to be?

A Yes.

Q What was it?

A Mr. Unger stated that if he were successful in purchasing the stock of the corporation, it was his intention to make a quantity of it available at the price he paid, plus any other acquisition costs, to members of the management, as designated by Mr. Lenz.

Q And what was your understanding as to which members of the management were going to be given an opportunity to participate in that purchase, in addition to yourself?

A Those that were designated by Mr. Lenz.

Q So you don't know anybody other than Mr. Lenz that was going to do it offhand?

A I couldn't speak firmly on that point.

Q Don't you consider that that gave you some interest in the Unger offer, Mr. Oard?

A Yes.

Q Isn't that one of the reasons that you opposed this particular sale, because you would have an opportunity to participate in the stock ownership of the company if the Unger offer were pursued?

A May I comment on that without a direct answer? I

will give you a direct answer if you like.

Q Give me a direct answer.

A Yes, it may very well have been. However, there have been a number of potential acquirers talk to us over the period of the last year and a half, and in no case has any prospective acquirer failed to offer to members of the management some form of consideration either in the form of executive bonus, stock bonus, or stock option. So that Mr. Unger's discussions in my view were not out of line with any others that we had had.

Q I don't think you have testified as to any definite offers. You said, if I understood your testimony, that a number of other people had manifested some interest?

A That's right.

Q And you mean in connection with that manifestation of interest that they indicated to the officers that they would be given some extra consideration if they would go along with the deal?

A That's right.

Q And this proposition doesn't give you any special consideration, does it?

A Which proposition?

Q This sale which is under attack in this proceeding before the court.

A Yes.

Q What does it give you?

A I was offered 1,000 shares of Sonderling stock as an option by Mr. Sonderling.

Q That was when?

A That would have been a week ago Friday, this last Friday.

Q That was after this had been voted upon by the board?

A That is right.

Q But no commitment was made to keep you in the employment of the company, or anything of that nature?

A On that same Friday, which was a week ago, and prior that very same week, on Tuesday, if I remember correctly, at a meeting of a number of employees to meet Mr. Sonderling and one of his associates, Mr. Sonderling stated that he would grant one year employment contracts to those who wanted them.

Q Who wanted them?

A Yes.

Q I think you testified that you didn't know when Mrs. Arlinghaus and the other people who sold their stock in Modern Teleservice actually consummated that sale, is that correct?

A By "consummate" do you mean close the sale?

Q Yes.

A Get the certificates of stock?

Q Yes.

A (There was no response.)

Q You testified that they had spoken after the April 8 meeting that they were going to another meeting to make some closing on the Teleservice Corporation?

A That's correct. On that same day Mr. McCallum, who was a shareholder in Teleservice, stated that he was to visit Mr. Pepper's office that afternoon to pick up his shares of Sonderling stock. But I don't know whether he did or not.

Q But this was after the morning meeting of April 8?

A That is right.

Q Do you know whether there was even a definite and binding agreement to sell this Teleservice stock prior to the morning of April 8, 1968?

A No. May I comment on that?

Q No, I don't care for any comment.

A I read it in the paper.

Q You read it in the paper when, the next day or so?

A No, sometime prior to the April 8 meeting. There was mention in the Wall Street Journal that Sonderling Broadcasting had agreed to acquire Modern Teleservice for stock of the value of something over $3,000,000. But that

doesn't necessarily always come out the way they say it.

Q You spoke of these other offers, but the only definite one that you mentioned was the Unger offer. Were there any other offers in writing, or any definite commitments of anybody to purchase the assets of this corporation, that you know of?

A I didn't see any in writing, and I didn't hear any firm verbal offer other than that to which I referred.

Q And that was the purchase of stock and not a purchase of assets?

A That's correct.

Q And that would have been a deal with the stockholders and not with the corporation?

A That's right.

Q You are not a stockholder of the corporation, are you?

A No, I am not.

Q But you were interested in becoming a stockholder of the corporation, or whoever acquired the corporation?

A That is correct.

Q You testified that you never heard of this corporation that was to get the $300,000 commission, the Commonwealth Development Corporation?

A That's correct.

BY MR. CARPENTER:

Q Let's go back. When did you first meet Mr. Unger?

A I first met Mr. Unger about 15 years ago, but in the matter at hand I first met Mr. Unger in January, and I hadn't seen him for 15 years.

Q How long did your contact with him continue after January, or was there any further contact before the April 8 meeting?

A Yes.

Q Do you recall how many meetings you had with him?

A Three or four.

Q Where were those meetings, Mr. Oard?

A In New York, before the April 8 meeting, and in Cincinnati.

Q During the course of his discussions with you, did he ever indicate what his top offer would be for the corporation?

MR. ANDERSON: Your Honor, I object to this as irrelevant in this sense. Mr. Unger, as I understand it, was never making any offer for the corporation. He was offering to buy stock from the stockholders. So I don't see how we can talk about what his top offer was for the corporation.

MR. CARPENTER: I think that is a good objection, your Honor, and I will withdraw that question and rephrase it. Inadvertently I stated it that way.

BY MR. CARPENTER:

Q During your discussions with Mr. Unger did he ever indicate whether or not he would be willing to go above $21 a share to acquire the stock of this corporation?

A Yes, he did.

Q Did he indicate how far he was willing to go, or what figures above $21 a share he was willing to pay?

A We discussed a total of $2,500,000.

Q Did he indicate what his reaction was to a total of $2,500,000?

A If I remember his words, he said, "It doesn't scare us."

Q In Modern Talking Pictures was there any individual or group of individuals who were the persons who carried on discussions with persons who desired to offer to acquire the stock or the assets of the corporation?

A Yes.

Q Who were those people?

A They were principally Carl Lenz, our president, and I, and Mr. Vickers, the treasurer.

Q Did Mr. Pepper and Mrs. Arlinghaus also carry on negotiations for the sale of stock, or the assets of the corporation, as far as you know?

A Mr. Pepper introduced us to at least one prospective

acquirer, namely, Wometco Enterprises. I believe that is the correct name. I don't recall being present when Mrs. Arlinghaus participated in any negotiations.

MR. CARPENTER: I have no further questions.

RECROSS EXAMINATION

BY MR. ANDERSON:

Q Did you ever communicate to the stockholders what Mr. Unger's top price would be, or what he was interested in paying?

A I never did, no.

Q So they didn't know anything about this $27 per share that you are talking about?

MR. CARPENTER: Objection. It certainly does not follow that because Mr. Oard did not communicate with them that the stockholders did not know. He has already testified that Mr. Unger was in contact with Mr. Pepper and Mrs.Arlinghaus, and Mrs. Arlinghaus is the principal stockholder.

BY MR. ANDERSON:

Q Was this a cash offer that Mr. Unger made?

THE COURT: I assume your question has been withdrawn?

MR. ANDERSON: No. Would you repeat the question?

(The reporter read the question.)

THE COURT: I take it Mr. Carpenter objected to that,

A Yes, sir.

MR. CARPENTER: I have no further questions of this witness, your Honor.

CROSS - EXAMINATION

BY MR. ANDERSON:

Q While we are on the subject of Plaintiff's Exhibit No. 8, this letter of March 22, how did you come across it two weeks ago, Mr. Vickers?

A It was exhibited to me by, I believe, Mr. McCallum.

Q Mr. McCallum showed you that?

A Yes.

Q Well, this letter, Plaintiff's Exhibit 8, doesn't purport to speak on behalf of the corporation, does it?

A No, sir.

Q It's speaking with reference to two of the stockholders of the corporation?

A Precisely, sir.

Q I couldn't make much sense out of your testimony concerning the interest of Mrs. Arlinghaus and Mr. Eberle in Sonderling as a result of their sale of stock in the Teleservice Corporation, the exchange of stock. Did you compute what their interest was in the Sonderling Corporation after that exchange or --

A That's all.

Q And was there any offer submitted to th board that anybody else had received from them?

A Not to my knowledge, no, sir.

Q I see. Did you consider this offer of Sonderling Broadcasting Corporation a fair offer for the assets of this corporation?

A I do, sir.

Q And I'll ask you once more, have you ever received any better offer?

A No, sir.

Q Or any other offer of any kind, for that matter?

A Outside of this management offer, no. Now, prior to April -- not prior to April. Subsequent to April, there have been letters written, but I cannot call them any firm offers.

MR. ANDERSON: You may cross-examine.

CROSS - EXAMINATION

BY MR. CARPENTER:

Q Mr. Eberle, when did you first hear of the proposal by Sonderling to acquire the assets or stock of Modern Teleservice?

A Of Modern Teleservice?

Q Excuse me; not Modern Teleservice but Modern Talking Pictures.

A I would judge to the best of my recollection the latter part of March.

Q I'm going to show you Plaintiff's Exhibit No. 1 and ask you when you first saw that?

A I'm just trying to think when I was up north here. The nearest I can come to it with an honest reply is the latter part of March. It was definitely subsequent to this date.

Q Now, that document is dated March 20, is it not?

A That's right.

Q Was a copy of it mailed to you?

A I'm not sure. I don't know as I have one in my files. I'm not sure. It may have been.

Q Did you attend the board of directors meeting of March 22?

A Yes, I was there.

Q Was that letter discussed at that board meeting, to the best of your recollection?

A To my recollection, I don't recall it being discussed.

Q Had you seen the letter by that time?

A No, sir.

Q You attended the meeting of April 8, did you not?

A Yes, sir.

Q Was that letter discussed at that meeting?

A This particular letter?

Q Yes.

A The terms of the letter were discussed. I don't know as the letter itself was produced.

Q Had you seen it at that time?

A I believe I had.

Q Do you know why, in view of the fact that it is addressed to the board of directors, it was not circulated among the directors when received?

A I have no idea.

Q Do you know who actually received that letter?

A No, I don't know factually.

Q Who showed it to you?

A Mr. Pepper.

Q Did he ask you to keep it secret?

A No, sir.

Q Did you attend the meeting which Mr. Oard has testified to that occurred on April 8 when Mr. Sonderling first discussed the negotiations?

A April 8?

Q Excuse me. I mean April 5.

A If that was a Friday, I attended that meeting in

Mr. Lenz' office.

Q Do you remember Mr. Oard asking at that time what price was being offered?

A Yes, sir.

Q And did anybody answer him?

A Yes, sir.

Q Who?

A Mr. Pepper.

Q What did Mr. Pepper tell him?

A Mr. Pepper told him that since he was not a stockholder and Mr. Lenz was not a stockholder and Mr. Vickers was not a stockholder -- Let me digress here:

He asked the question of Mr. Sonderling. Mr. Sonderling said he felt the answer should come from the stockholders. I was about to answer them, and looked over at Mr. Pepper and more or less nodded that he answer it, and he answered it in a lot more gentlemanly manner than I would have by saying that since -- having named them individually -- none of them were stockholders of the corporation, that he didn't see any reason for their knowing the facts.

Q And so they did not disclose the facts?

A This is right.

Q So in fact the offer which was to be presented at the April 8 meeting was an offer not to the stockholders but

to the corporation?

A This offer -- or rather this discussion in the office of Modern Talking Pictures Service at 1212 Avenue of the Americas on Friday morning at which Mr. Sonderling attended and Mrs. Arlinghaus and myself, Mr. Pepper, Mr. Lenz, Mr. Vickers and Mr. Oard, was a meeting to introduce Mr. Sonderling to Mr. Lenz. I don't consider it as an official meeting of any board or any group of stockholders.

Q Do you remember the pending question, Mr. Eberle?

A Do I remember --

Q The pending question?

A Which pending question?

Q The question I just asked you which you are now answering.

A No, I don't remember what the question was other than the fact -- do I remember attending this meeting, yes.

Q My question was this: You have testified that certain directors of the corporation, or specifically Mr. Oard, had asked what price was being offered to the corporation for sale of its assets, and you had just said that Mr. Pepper's response was that it was none of the business of the directors.

A I'm very sorry. I'll have to digress because I believe that the question was asked of Mr. Sonderling, how much are the stockholders getting for their stock. Now, this

is entirely different, and this is as I remember it.

Q This is entirely different from what you have previously testified this morning or this afternoon.

A I beg your pardon?

Q This is entirely different from what you previously testified to this afternoon.

A No, no. I misinterpreted what you said in the sale of assets. The question that I understood that Mr. Oard put was how much are the stockholders getting for their stock. Now, this is none of their business, is it?

Q The amount that Sonderling was offering was an amount which he was offering to the corporation, was it not?

A Well, if that's what the letter says, I guess it is.

Q I'm going to ask you about what the letter says next. This is an offer which you voted on, Mr. Eberle. But first I want to ask you what was the proposition that was presented on April 8. Was it a proposition to the corporation or to the stockholders, if you know?

A I don't know. I'm not a legal minded individual.

Q All right. Your testimony then as to your recollection of the meeting of April 5 should be viewed in the light that you don't really know what kind of an offer was presented?

A All right.

Q Is that correct?

A Yes.

Q Now, let me ask you about the offer on April 8, Mr. Eberle. How much was the corporation going to get as a result of that offer?

A As a result of that offer -- Well now, again you are bringing the corporation in. If you were to ask me how much I as an individual was to get, it was always based on a fi[illegible]f approximately $26.45 which would add up to two and a half million dollars.

Q That you were going to get?

A $26.45.

Q Oh. That the corporation was going to get?

A No, no, no. For the purchase of my stock, I would get $26.45 a share. Now, whether you call it assets or stock, this is -- I have to look at it the way it computes for me.

Q Now, how much was the corporation going to be paid for its assets, or don't you know?

A I don't know.

Q At the meeting on April 8, you were sitting at a board of directors meeting as a director of this corporation rather than as a stockholder, were you not?

A That's right.

Q And you don't know how much you were approving as the

amount of the offer to the corporation?

A Here it says in no uncertain terms: "We submit herewith a firm bid subject to the following qualifications to acquire all of the outstanding stock of Modern Talking Pictures Service, its subsidiaries, if any, and/or all of its assets for $2,800,000."

This I can understand.

Q Fine. Now, can you understand the resolution which you voted on on April 8?

A Yes, sir. That sold the assets.

Q Of that $2,800,000, how much was to go to the corporation, if you know?

A I don't know except that I would -- No, I don't know.

Q You knew, of course, that $300,000 was to be paid out at some sort of a commission, didn't you?

A I had heard that, yes.

Q What were the services which were performed for which you were paying or the corporation was becoming obligated to pay $300,000?

A Well, I understand that $200,000 of it was corporate -- either brokers' finder's fees you call it -- you name it. I don't know what they call them. Of that amount, Mr. Pepper was to get $100,000.

Q Now, what finding services had been performed for

the corporation?

A I have no idea.

Q What was the corporation that was to receive the $300,000?

A What was the corporation?

Q Yes.

A I have no idea. I -- I have no idea.

Q And what had Mr. Pepper done to entitle him to $100,000, if you know?

A Well, I don't know.

Q Now, Mr. Eberle, you mentioned that you got 8,571 shares of Sonderling.

A That's right.

Q And that this stock was received as a result of some papers which you had initialed at one point and a settlement which took place on April 8 and a distribution of stock which took place, I think you said, on April 9. I want to go back to the first step in that transaction:

When did you first hear of the proposition that Sonderling might purchase your stock in Teleservice?

A It was subsequent -- I would have to find out what date. There had been a deal on for Teleservice with an outfit by the name of Fuqua. The name came out before. And as a result of that fall-down of that Fuqua deal, then I heard

about the Sonderling deal.

Q So are we talking about something about in January or February of 1968?

A Oh, goodness no, because -- if I could refresh my memory somehow --

Q Maybe this will refresh your memory, Mr. Eberle (indicating). You have in front of you Plaintiff's Exhibit No. 1, and you will notice that that is dated March 20.

A That's right.

Q You note that there is a reference in the first sentence of that letter to the fact that the initial documents have been approved for the sale of Modern Teleservice, is that right?

A All right.

Q Does that refresh your recollection as to when you first heard of the proposition?

A It must have been prior to March 20. It could have been the 19th, though.

Q Right.

A I don't know.

Q But in any event, it was prior to March 20?

A Well, it would have to be.

Q Right. And had you, as that letter suggests, signed some documents for the sale of your stock prior to March 20?

A I must have if that is so.

Q So that --

THE COURT: Wait a minute. I didn't hear his answer.

THE WITNESS: I said I must have.

Q So that as of March 20, in any event, you had undertaken to sell your stock?

A That's right.

Q And had Mrs. Arlinghaus undertaken to sell her stock as of March 20?

A I don't know.

Q The piece of paper you signed was signed only by you and not by others?

A I beg your pardon?

Q The document which you signed for the sale of your stock was signed only by you?

A I have no recollection.

MR. ANDERSON: May I interrupt? I think I might have misled both you and the court in questioning this witness, and maybe I didn't understand the situation myself.

I have been talking about an exchange of stock. Actually, as I understand the true facts, Modern Teleservice sold its assets to Sonderling in exchange for stock of Sonderling. Then Modern Teleservice dissolved and distributed that stock in distribution. That was the transaction. So we

have been talking cross purposes, apparently.

MR. CARPENTER: I see. I don't know whether that has any bearing on this line of questioning or not. I'm trying to digest that.

MR. ANDERSON: I mean, you might wonder, well, why didn't he sign a contract, and so forth.

BY MR. CARPENTER:

Q What was the document which you signed approving prior to March 20th a sale of Modern Teleservice?

A Perhaps the attorneys can show me the piece of paper I signed, but I can't remember what it was.

THE COURT: Mr. Anderson, to cut through [illegible], may I assume that before March 20th this witness had acquiesced in a plan whereby his interest in Modern Teleservice would in some way or other get to Sonderling?

MR. ANDERSON: Yes, your Honor. Only the date of it was apparently the 25th day of March of '68. He signed a consent to the sale of assets. That's what he signed.

MR. CARPENTER: Well, maybe we can cut through all of this, your Honor. My questions are merely directed to show that prior to April 8 this witness had acquired an interest evaluated at around $400,000 --

THE WITNESS: I think that's a little high.

MR. CARPENTER: -- in Sonderling, or had a right

to acquire it, and that Mr. Pepper had a similar interest, and that Mrs. Arlinghaus had an interest evaluated at about three times that.

MR. BECKER: So that the posture may be correct -- I'm sure you would want the facts:

On the 8th of April -- as of the 9th of April, the execution of the reorganization and agreement for sale of assets was executed. Sonderling Broadcasting Corporation issued 130,000 shares of stock to Modern Teleservice. Modern Teleservice made a distribution to its stockholders as of the 9th of April, 1968. That's the posture in fact, and those are the facts.

MR. CARPENTER: Well, can we agree that as of April 8, Mr. Eberle and Mr. Pepper had an equitable interest, if not a legal interest, and a right to acquire an interest in Sonderling evaluated at somewhere around $400,000, and Mrs. Arlinghaus had an interest of approximately three times that size?

THE WITNESS: If 8,571 shares were multiplied by $40, it would only amount to $340,000.

BY MR. CARPENTER:

Q Is that what the stock is selling at today?

A Somewhere in that area.

MR. BECKER: Forty-four and a quarter.

A But it was testified here prior to this that the stock was only worth $30 and it was up to $400,000. I wish it had been. I will still have taxes to pay if I sell it.

THE COURT: I'm not sure that Mr. Carpenter has had a response to his question.

MR. ANDERSON: I'll make a response. I will concede that the stockholders of Teleservice, Inc., had a potential expectation of acquiring stock in Sonderling as a result of the reorganization agreement which they entered into as of March 25, 1968, and that potential was realized finally when the deal was consummated on April 9.

THE COURT: And is the amount of each of these director's interests involved here, Mr. Carpenter?

MR. ANDERSON: Mr. Eberle has testified as to how many shares he received in that distribution and liquidation.

MR. CARPENTER: He received 8,571 shares that he has testified to, your Honor, which as of today would be evaluated at something in excess of $300,000, and as of the date of the transaction, it would be evaluated at somewhere between $200,000 and $300,000.

THE WITNESS: Something less than $300,000.

BY MR. CARPENTER:

Q Did Mr. Pepper receive an interest of about the same magnitude?

A I believe so.

Q And did Mrs. Arlinghaus receive an interest --

A Well, let's put it this way, counselor: As you can see, their interests would have been the same ratio as my interests.

Q And Mrs. Arlinghaus' interest in Modern Teleservice as of the date of the sale was about three times your interest?

A I would not know without having my memory refreshed.

Q All right. What did that amount to in terms of payment per share of Modern Teleservice which you received? Was the exchange on a share-for-share basis?

A No. The exchange -- well, let's put it this way: Let's make me the guinea pig. I had 4,200 shares of Teleservice for which I received 8,571 shares.

Q You received 8,571 shares?

A That's right.

Q Of Sonderling?

A That's right.

Q And it has been testified that the stock was at that time selling at around 30, so --

A 25 or 30, yes.

Q So you received around $57, $58, $60 a share in terms of Teleservice?

A That's right.

Q Now, Mr. Pepper received stock in Sonderling at the same time. Do you recall how Mr. Pepper had acquired his interest in Teleservice which he later turned into an interest in Sonderling?

A Only through what has already been testified.

Q I see.

A In that Mrs. Arlinghaus and myself and -- I'm not even sure whether it was we three or all of the stockholders -- sold stocks to Mr. Ritenour at $10 a share. I sold 2,800 shares.

Q And you --

A When it was all analyzed, why, Mr. Ritenour had X number of shares, Mr. Lipsky had X number of shares and Mrs. Miriam Pepper had X number of shares.

Q Now, that was at $10 a share, was it not?

A This is right.

Q For which, when Mr. Pepper's interests became converted into Sonderling stock, he ended up being compensated at the rate of around $60 a share?

A Well, it would have to be, I guess.

Q Now, my question to you is what was Mr. Pepper given this stock in Modern Teleservice for, or what was he sold it for in Modern Teleservice at $10 a share?

A You would have to ask Modern Teleservice this. I

think for legal advice.

As far as I am concerned, I might say this, that I was perfectly happy in the situation that developed for me, and I think as an individual, this is all I'm interested in.

Q So you were willing to turn over 40% of your stock?

A That's right.

Q Ten per cent of it to go to Mr. Pepper?

A That's right.

Q And as far as you know, the others were too?

A That's right.

Q Though you are not clear what Mr. Pepper was being given this privilege for?

A Oh, I presume, I say.

Q You presume. All right. Do you know what Mr. Pepper was to get out of the proposed sale of Modern Talking Pictures stock or assets to Sonderling apart from the $100,000 commission?

MR. BECKER: Excuse me. Would you read that question, please?

(Question read.)

MR. BECKER: Don't you want to restate that?

MR. CARPENTER: No.

A The $100,000, that's the same $100,000 we have all been talking about, isn't it?

BY MR. CARPENTER:

Q What else was he to get, if you know?

A I don't know of anything else.

Q Do you know of any other benefit he was to receive?

A No, sir.

Q What was the contract referred to in the resolution of April 8, 1968, which you voted upon?

A May I have the minutes or something?

Q Yes. Which minutes would you like?

A Now, was this a contract or was this a proposed contract?

Q I'm going to refer you to --

A Oh, it doesn't matter. I mean, it's a matter of semantics as to whether the secretary's notes and the final minutes read correctly.

Q I'm directing your attention to the reference to the contract.

A The contract of sale with respect to the assets. Well, that will have to come yet.

Q All right. Did you know what the representations or warranties were in the contract as to which a 50% escrow fund was being set up?

A Well, I only know to this extent: As a layman, warranties and conditions are supposed to refer to contracts, aren't they, and such? I am a layman.

Q I'm just asking you what your knowledge was as of April 8.

A Well, my knowledge of April 8 was that Sonderling would want a warrant that all of the contracts that we had, the leases that we hold are all perfectly legal and in good force and form, and it's my understanding that the officers of Modern Talking Pictures Service Corporation, Incorporated, will not warrant. In other words, they haven't come up with a list of contracts. Now, whether they themselves don't know what they have on the books or not, I don't know.

Q So that the escrow --

A They are not cooperating with our attorney, that's for sure.

Q So that the escrow agreement funds will have to be applied to this failure to warrant?

A Well, I don't know. I'm not a legal mind. You will have to answer that question.

Q As of April 8 you didn't know either?

A This is right.

Q Do you know if a finder's fee was paid in connection with the Teleservice proposition?

A I have no idea.

Q You don't know?

A No.

Q Was the sale at the ratio of two to one in stock?

A Well, figure it out; 4,200 shares for which I received 8,571. That's approximately two to one, isn't it?

Q Do you know whether you got a full amount of stock out of --

A Yes. I know I got 8,571 shares, yes, sir.

Q Do you know what number of shares were allocable to your 4,200 shares though?

A Yes. I computed those out, and I think that that is approximately correct.

Q Was any additional finder's fee paid to Mr. Pepper as a result of that transaction?

A I don't know of any finder's fee.

Q Do you know of the Chem Study contracts which Modern Talking Pictures has?

A Yes.

Q How valuable an asset are they in Modern Talking Pictures with reference to its total assets?

A Very, very, very small.

Q Very, very small?

A This is my personal opinion now.

Q Yes. At what figure would you value them?

A Well now, let's put it this way --

Q If you know.

A I don't know. That saves time.

Q Do you know whether or not in fact they would be assignable in the event there were --

A I have no idea.

Q If they were not assignable, do you know what damages Modern Talking Pictures would be required to pay pursuant to the proposed escrow agreement?

A I'm only a layman. I have no idea.

MR. CARPENTER: I have no further questions. Thank you, Mr. Eberle.

MR. ANDERSON: Does the court have any questions?

THE COURT: Mr. Eberle, I just have a few questions.

BY THE COURT:

Q Were you employed by Modern Talking Pictures Service during your professional work or during your business life? Were you employed by the company?

A I was employed by the company from its inception until approximately 1942 as a full time employee. I then -- because Mr. Arlinghaus was then president -- had been approached twice by the predecessor company who owned Modern Talking Pictures Service as a division and who sold it to myself, Mr. Arlinghaus and several other stockholders, and they had asked me -- this is getting into the war years now -- to come back to work for them. He had two calls. They were about

two months apart. The second one he came to me and told me that he had to come and tell me that he had this call to go back to them. I went back, and it was to my benefit. This business at the time was being affected by the war.

Q To cut through it, is it accurate to say that --

A It's accurate to say that I was secretary to the corporation from its inception until January, 1963 -- a director a great portion of that time and only a director since December, 1964.

Q Well, you were employed by --

A Some other corporation.

Q Between 1943 and --

A During that time, that's right.

Q Between 1943 and 1963?

A And 1963.

Q All right. Now, the sale of assets to Sonderling as expressed in the resolution approved April 8, do you know how much the corporation, MTP, netted from that or will net from that sale of its assets?

A Modern Talking Pictures Service. Now, on this most recent which involves this action --

Q What this lawsuit is about, yes.

A Yes. Modern Talking Pictures Service itself is to be paid, to my best knowledge -- because it computes down to

my personal mechanics -- $26.45, which is approximately $2,500,000. Now, whether Modern Talking Pictures Service is paid $2,800,000 and then pays $200,000 as a finder's fee and $100,000 to Mr. Pepper is of small consequence to me because at $26.45, as I say, it will compute the 94,000 shares out to two million and a half, I think, approximately, and I think that this is a fair price. Now, I can go further on this --

Q Let me ask you, is it accurate to say that you are primarily concerned with and interested in and knowledgeable about the per share price?

A That's right.

Q Do you know how much the corporation itself will receive or net from the sale of the assets except in terms of $26 a share?

A The corporation will net nothing in terms of assets except that it will become owned by a corporation which has assets behind it which will allow it, Modern Talking Pictures Service, to do whatever expansion work they have.

They mention, for instance, this Chem Study, and they apparently need money. They would have to go to a bank and borrow. Now, if this sale were made, I believe the Sonderling Broadcasting Company could bring in new money which would help their financial position.

Q Whose financial position?

A Modern Talking Pictures Service, the corporation's financial position. Right now they are borrowing from a bank.

THE COURT: I think I understand. You may step down.

MR. CARPENTER: Your Honor, may I ask him a couple of questions on what he said in response to your Honor's questions?

THE COURT: Yes.

BY MR. CARPENTER:

Q I have just a couple of questions on what you just said in answer to Chancellor Duffy's questions, Mr. Eberle:

You said you thought the corporation would get around $26.45 a share or around $2,500,000 which would be the $2,800,000 less the $300,000 finder's fee. Now, are you aware that the resolution you approved provides that 50% of that $2,500,000 shall go into an escrow fund for Sonderling's benefit?

A No. I think you are wrong there. It doesn't go into an escrow account for Sonderling's benefit. Fifty per cent of it will go into an escrow account, I'll grant you, in case any of these warranties are misrepresented, but don't you ever fool yourself; come January 2, 1969, I will get my other 50%.

Q Well, will you get it regardless of whether or not

the other stockholders get it?

A No; they will all get it.

Q And why do you say that?

A Because I have faith in the people I'm dealing with.

Q I see. All right. Now, in the event the escrow fund does in fact go to Sonderling's benefit, the corporation, Modern Talking Pictures, will realize not $26 a share but $13 a share, will it not?

A I think that you are belaboring the point and you are misrepresenting. I think this is semantics. As far as I'm concerned, I'm going to get $26.45 for every one of the 13,400 shares that I control, and every other stockholder is going to get $26.45 for all of the stock that they control, but it will be in two splits.

Q Has Mr. Pepper assured you that you will get your $26.45?

A Mr. Pepper doesn't have to assure me. I know Mr. Pepper and I have since met Mr. Sonderling, and to be very frank with you, I have a lot of faith in them.

Q All right. Now, you said it was your understanding that this corporation, Modern Talking Pictures, was going to be able to go on and be supported by the financing of Sonderling and would be able to do what they wanted to do with respect to, for example, the Chem Study contract, is

that correct?

A Yes, sir.

Q Are you aware that you voted to dissolve Modern Talking Pictures and this corporation will not go on but will disappear?

A Again, Modern Talking Pictures Service will continu to go on -- I never heard so much nonsense in all my life. In order to do this -- and me being a layman -- it's going to be dissolved, but in the next breath it's going to be reestablished. The trouble is that the officers of this corporation who don't own stock want the corporation for $18 a share or less, if they can get it, and this is exactly what this action is all about.

Q Do you remember the pending question?

A Oh, goodness. What is the pending question now?

(Question read.)

A Yes, sir, I am.

Q So that --

A But I don't go along with that the corporation will not go on. That I will not go along with.

Q What is going to happen to Modern Talking Pictures, the corporation that is the defendant in this suit?

A Why, it's going to be dissolved. There is a corporation that's going to be called Frank Arlinghaus

Corporation, and then there will be a new corporation, Modern Talking Pictures Service, Incorporated, which will go right on in business again.

Q Is that part of the resolution you voted on?

A I think it is in there that I voted on the dissolution of Modern Talking Pictures Service, and I also voted on a resolution that has those very words, that the new corporation will be known as Frank H. Arlinghaus or any other name.

Q Do you know why it is that Sonderling is requiring that 50% of the purchase price; that is, over a million dollars be set aside as an escrow agreement?

A I don't know whether Mr. Sonderling is requiring that or not, but he would be a fool if he didn't ask for some indemnity against warranties.

Q Do you know why the indemnity has to be as large as 50% of the entire purchase price?

A No, but I don't care.

Q I see. Did you make any inquiry as to why it had to be as large as 50%?

A I know one thing from a personal standpoint: If it is 50%, I stand to save some tax moneys, don't I?

Q Because you won't be paid as much for your stock?

A No. I will be paid in two years.

Q Oh. And there is an advantage in being paid over a period of time?

A I think so.

MR. CARPENTER: All right. Thank you.

THE WITNESS: Just in those two years, yes. But there is no advantage in being paid $18 a share, $3 down and $15 over a ten year period with the last five years with the principal.

MR. CARPENTER: I understand.

THE WITNESS: May I be excused, your Honor?

THE COURT: Do counsel have any objection?

MR. BECKER: No questions. We are through.

THE COURT: You may be excused, Mr. Eberle.

(Witness excused.)

SHERMAN UNGER, having been first duly sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. CARPENTER:

Q Would you state your name and present home address for the court and the court reporter, please, Mr. Unger?

A Sherman Unger, 7935 Indian Hill Road, Cincinnati, Ohio, 45243.

Q Mr. Unger, what is your occupation?

A I am an attorney.

Q And with what firm are you associated?

A I'm a partner in the firm of Frost & Jacobs in Cincinnati, Ohio.

Q And can you give us some idea of the size of that firm, Mr. Unger?

A Yes, sir. We have thirteen partners and twenty-five associates, I believe. I have been a partner since January of 1963.

Q Mr. Unger, how long have you been engaged in the practice of law?

A Since 1953. Three years were spent in the military, Judge Advocate.

Q And in addition to practicing law, do you also explore and make investments for your own account and the accounts of others associated with you?

A Yes, I do.

Q Did there come a time when you and some of your business associates as distinguished from associates in the practice of law became interested in Modern Talking Pictures?

A Yes, Mr. Carpenter. Over the holidays of 1967, in December, a man that I grew up with and whom I had known since the second grade was a guest in my home. He is the

vice president of Modern Talking Pictures. He explained to me some of the problems that they were having as he understood them and suggested that if I could put together a group of investors that would be interested, it is something that the executives would appreciate.

Q And could you just describe, giving dates as you recall them, what thereafter happened in the progress of your negotiations?

A Yes, sir. I had this meeting with Dan Kater in my home in January. Our relationship is reasonably close in that I was best man at his wedding and he and his wife are godparents to my oldest child. I rely on his judgment quite heavily.

After that I made an appointment to have lunch with Bill Oard --

Q Excuse me, if I may interrupt. Who is Mr. Kater?

A Mr. Kater is a vice president of Modern Talking Pictures.

Q I see. Excuse me.

A He has charge, I believe, of their midwest and far west sales out of their Chicago office.

I made an appointment for lunch with Mr. Oard in early January, I believe about the 12th. I believe it was on a Friday, the 12th of January, in New York. I went to New York,

and we had lunch. We talked about the prospects of acquisition. We talked about the company. I indicated some initial interest. I said we would need some figures and we would need some background on the company, and Mr. Oard said that he would talk with the president; that they had been authorized to talk with prospective purchasers, and he would send me some figures.

I believe that in a letter dated the following Monday and a letter dated the following Tuesday, the 15th and 16th, he sent me first a certified statement of the fiscal year ending June, 1967, and subsequently some other figures.

I studied them. I thereafter made an appointment to spend the evening going over the figures with an associate of mine. I believe we spent the evening of the 22nd of January reviewing the figures, talking about the prospects of the company, our idea of it as an investment and what I knew about it.

Thereafter, and I suspect it was in the -- I'm pretty sure it was in the same week, without a calendar -- I think the 22nd was in the early part of the week. Later that week we made an appointment to go to New York to meet with Carl Lenz, the president of Modern Talking Pictures.

The night before, myself, my associate, Bill Oard and Dan Kater had dinner in New York. We asked a lot of

questions about the company and actually how they made their money and what they did, their different division and its prospects and its problems. They told us a lot about the company.

Subsequent to that, the following morning either at 10:00 or 11:00 we appeared at the offices of Modern, met with Bill Oard and Carl Lenz. We talked at length with them about the company, the figures, and gave them our initial idea of why we were interested as investors, explored a price at that time, got some background on people that had been looking at it before, asked about everything that we could think of that would interest an investor, got what I thought was a group of candid answers, and this is the first time I met Carl Lenz, and I was very impressed with him.

We then went back to Cincinnati. Again we studied the figures and the prospects and the future of the company.

Thereafter, in February -- I believe it was February 14 -- I left home on Valentine's Day to fly into New York again. I believe that evening I had dinner with Bill Oard after my flight landed. The following morning I met with Bill Oard, Carl Lenz and for the first time met George Vickers.

We discussed in length again the future and the prospects of the company. I was interested in meeting the

treasurer and was asking some questions. Particularly one that concerned me was the aging of the accounts receivable. They were showing at that time, I believe, a million six out of net assets of a million seven in accounts receivable, and they were showing virtually a negligible write-off to protect that. So I was quite interested to find out what these accounts receivable represented, what their aging was and if in fact they were a sound current asset. So I talked at length with Mr. Vickers about that.

In turn, at that meeting those gentlemen discussed the fact that they had the commitment from Mrs. Arlinghaus that, as I understand it, Frank Arlinghaus had asked her not to sell the company to anyone upon his demise unless they approved. They told me that they had that commitment, and they quite frankly said, "What will you do for the company? What are your thoughts about the executives?"

It was pretty clear to me even before this meeting that this is a service company. I am a lawyer. I live in Cincinnati. It is run out of New York. It was the same thought to my associates, that when you acquire a service company, you acquire something that is good only if the people that are running it are good. Our interest was to invest in it and to have it continue to go and maybe put more money in it to develop some thoughts that they had thrown out as

far as future. But at the moment, we wanted to make certain that the management that it had would stay with it. It was to my benefit to keep that management because I couldn't run that company.

So at that meeting I told them we had talked about this in our group and we felt that it was to our benefit to make an equity position available to them. They indicated that they were interested in that. So I told them that our thought was that we would make equity available to them on some basis, perhaps 30%, but that if we made it available to them, we would make it available to them at the price we made plus any acquisition costs or promotion costs. Any other moneys that we have in it would have been capitalized on the acquisition. We would proportionately relate that to the shares, and then we would make it available to them, but they would have to buy it.

This seemed to interest them, and they seemed really anxious to have an equity position in the company that they were running, and I was anxious to have them in the same thing because it is my judgment that if you are not running the company yourself, you want to have people that are running it that are looking at that bottom line, and this was a very favorable arrangement.

We realized that their interest might have exceeded

their capacity to buy at that moment, and we indicated that we would not just say that they would have to buy within the next twelve or fourteen months, but this would be something we would make available over a period of years.

I thereafter went back to Cincinnati and talked with my associates, and in an effort to show my good faith to the executives, I drafted a form of agreement that stated it was our intent to make available to them equity in the corporation if we acquire it at a price that we would pay plus our acquisition costs. I also at that time had pretty well determined by talking with Mr. Lenz, Mr. Oard, Mr. Vickers and my associates that we would offer $23.20 a share. We also at that time were talking about a straight cash acquisition.

I wrote a letter -- I think this one was on Washington's birthday -- to Mr. Lenz. I believe it was the 22nd of February. It was a cover letter with the agreement indicating we would pay in cash and we would pay -- indicating our opening bid. I think I used that word. We were actually prepared to pay more, and we talked about this, what the ultimate value of the company might be, and we saw it someplace from whatever reasonable range through $27 at something that by our determination we would pay, and we indicated that.

Q I'm going to show you a letter, or what purports or appears to be a copy of a letter dated February 22, 1968,

to Mr. Lenz, the president of Modern Talking Pictures, and ask you if that's the letter to which you referred?

A It is. I have a carbon with me.

MR. CARPENTER: All right. I ask that this be marked as Plaintiff's Exhibit No. 9.

MR. ANDERSON: I would object to the offer of this letter in evidence unless there is some showing that it has been brought to the attention of either the directors of the corporation or the individual defendants or the stockholders of the company. It's addressed to Mr. Lenz. There is no showing that it has been communicated to any of the parties in this case.

THE WITNESS: Mr. Lenz was, to my understanding at that time, a director.

MR. CARPENTER: Your Honor, the letter is addressed to Mr. Lenz in his capacity as president of the corporation at the corporation's home office, and he was a director then.

THE COURT: Mr. Anderson, did you want to say anything more in opposition?

MR. ANDERSON: No, I don't have anything to say. I say there has been no showing that it has been communicated to any -- any knowledge of that letter to any of the defendants in this lawsuit.

THE COURT: Since it is addressed to the president

of the corporation and it is reasonably close in time, I overrule the objection and admit it in evidence.

(A letter dated February 22, 1968, addressed to Mr. Lenz was received in evidence and marked Plaintiff's Exhibit No. 9.)

BY MR. CARPENTER:

Q You have gotten us up to February 22. Do you want to continue, please?

A Yes.

In a telephone discussion with Mr. Lenz subsequent to that letter, I asked him since he was closest to the situation how I should go about talking to the shareholders. He suggested that really the shareholders were represented by a Mr. Sidney Pepper who was counsel for the company as well as counsel for a majority of the shareholders and that it might be appropriate for me to talk with him.

Laboring under the belief that the executives had a commitment that the company would only be sold to someone that they approved of, I went to great lengths first to make sure that the executives in fact approved of us. Therefore, I asked again the executives to make the appointment for me with Mr. Pepper.

Mr. Lenz called me and said that he had talked with Mr. Pepper and that Mr. Pepper would meet with me, I believe

it was on March 12. I flew to New York the evening of March 11. I'm not sure whether I -- I may have had dinner again with Bill Oard. I would want to check my calendar. But I flew to New York the evening of March 11. I spent the evening there preparing my presentation to Mr. Pepper, and subsequently I went to Mr. Pepper's office at 120 Broadway. I had, after talking with Mr. Lenz, called Mr. Pepper to confirm the appointment since I was traveling from Cincinnati, and he said he would be glad to meet with me.

I believe the appointment was for 11 a.m.. I got there, and we talked a little while, exchanged pleasantries. I told Mr. Pepper we were prepared to and did offer $20 for 100% of the stock of Modern Talking Pictures. He said I was low.

During that meeting, Bill McCallum, the executive vice president, called Mr. Pepper from California. He told Mr. McCallum that I had offered $20 a share, and Mr. Pepper then turned to me and said, "McCallum says it's low." I believe "lean" was the word Mr. McCallum used.

I asked Mr. Pepper first of all who he represented, since I wasn't certain if he represented all of the shareholders, part of the shareholders or what his relationship was. He told me he was counsel for Mr. Eberle and his son and the stock that they control and whatever nominees, Mrs. Arlinghaus

in all of her capacities, Mr. McCallum -- subsequently I asked Mr. McCallum, and there was a dichotomy on that -- and several other minority shareholders. Mr. Pepper, before we went to lunch -- we did go to lunch together -- suggested that $25 would be a price that may be satisfactory. My response to that, since it clearly was within my range, was, "Would you talk to your clients and find out if that is satisfactory, and if it is, let me know?"

Thereafter we went to lunch at the Lawyers' Club across the street from his office, and at that conversation --

Q Incidentally, is Mr. Pepper here in the courtroom, Mr. Unger?

A That is Mr. Pepper with the paper in his hand (indicating).

Q I see.

A Before we retired to lunch, he talked much about Teleservice and what a great company that would be, and would I be interested in both companies. At the moment, I knew nothing about Teleservice except I understood the Fuqua deal had fallen through.

We went to lunch, and at lunch he suggested maybe I could pay more and it might be more advantageous if I were to use an installment purchase arrangement with notes payable over a number of years.

Q That was Mr. Pepper's suggestion?

A Yes, it was. This is the first discussion I had of installment or consideration of installment because we proposed to pay cash. All of my conversations with the executives up to that point had been for cash.

We talked awhile at lunch about the variations, and he suggested that I could well afford to take an installment purchase approach, pay more, pay an 8% or more interest which would replace dividends. Well, 8% on a couple rillion dollars was substantially more than the dividend the company was paying, and I told him I was reluctant to find myself in a situation where I might be committing the company to substantial interest payments because one of the things I think they need is working capital. However, if this was more satisfactory to his clients, I would entertain the thought and try to work out an approach.

After lunch we went back to his office, and in an effort to continue the Teleservice conversation, he gave me a ten year summary of the financial data of Teleservice to take with me and study, and he indicated that he would send me an audited statement that was due to be completed but that hadn't been completed yet.

I believe the next day or very shortly thereafter I wrote to Mr. Pepper telling him that we thought his

suggestion of an installment acquisition was interesting and we would look into it; that we would certainly consider Teleservice, but we wanted to progress with the Modern Talking Pictures acquisition first.

Q I want to show you what appears to be a copy of a letter dated March 13, 1968, and ask you if that is the letter to which you referred?

A Yes, it is.

Q All right. And is there a reference in there to the fact that Mr. Pepper had suggested deferred payment?

A Yes. I say, "We are giving some thought to your suggestion of deferred payment and are hopeful we can reach an agreement concerning the acquisition --"

MR. CARPENTER: I offer this in evidence.

MR. ANDERSON: No objection.

THE COURT: Admitted.

(A copy of a letter dated March 13, 1968, addressed to Mr. Sidney Pepper from Mr. Sherman Unger was received in evidence and marked Plaintiff's Exhibit No. 10.)

BY MR. CARPENTER:

Q What was the next development, Mr. Unger?

THE COURT: Before we get into that, I think we will recess at this time.

(Brief recess.)

BY MR. CARPENTER:

Q Just before the recess, Mr. Unger, you had been discussing your meeting with Mr. Pepper on March 12 and the suggestion he had made of the deferred compensation, or deferred payment, program. I am going to ask you if you will go on and tell us briefly what were the next developments in connection with your efforts to negotiate.

A One thing that came up in my meeting with Mr. Pepper that concerned me a bit was that as we were riding the elevator down from his office to lunch, on the 12th of March, he told me that a stock acquisition might cause some problem because he had contemplated a $100,000 fee for selling the company.

I listened, and I also was concerned about what that meant, whether we were to pay $100,000, or who would, and realized that this was a lot of money when you are paying cash, and was trying to determine how or where it went.

Subsequent to my letter to him of March 13, I got a note from him saying that at that time he had no authority to negotiate for Teleservice, and talked a little politics. Then I really didn't hear from anybody for a while, if my memory is correct, and I knew that Mrs. Arlinghaus was due back in the country from a boat trip. Mr. Pepper told me she was due back the 20th or 21st.

So I believe I talked with him some place in there before the 20th, earlier in that week, and said I understand there is a board meeting coming up, that Mr. Eberle would be in New York, that Mrs. Arlinghaus would be there.

I might suggest that Mr. Pepper recommended that I might want to fly down to Florida and see Mr. Eberle. I said, "Well, it takes a great deal of time; I would rather talk to him and Mrs. Arlinghaus together." I asked Mr. Pepper at that time if he would arrange a meeting in New York or Cincinnati between myself, Mrs. Arlinghaus, Mr. Eberle, himself, and whoever else should be present.

It was my intent all during this period, and I indicate this, I believe, in my letter of February 22, to reach an agreement as to price and then draft a contract. I didn't really see any point in trying to draft a contract that didn't have the right price or the right details in it. I wanted to reach an agreement in principle as to dollars.

I left my meeting with Pepper feeling that the range was some place between my $20 and a $25 figure that he had mentioned, and candidly thought we were well on our way to an acquisition.

I talked with Pepper early in the week that had Friday the 22nd in it, and asked him to make an arrangement for me to meet Mrs. Arlinghaus and Mr. Eberle on the evening

of Wednesday, the 19th of March. Bill McCallum, the executive vice president and member of the board, and holder of some roughly 15% of the equity, came to Cincinnati to meet myself and my associates.

We had a very pleasant evening. We went to dinner. I told Mr. McCallum of my interest, my conversations with Mr. Pepper, that I desired to acquire the company, that I had offered Mr. Pepper $20 a share. He knew that from his conversation with Mr. Pepper.

I then said that we hadn't gotten a counter offer yet, we sort of hoped that we would, but certainly we would go to 21. And we talked about Mr. McCallum's problems.

I told Mr. McCallum that we were prepared to go forward in cash but that we would acquire the company in any manner that was best suited to the shareholders. If he preferred an installment purchase, and he might, he was 67 years old -- he had a consultation contract with the company that would come into play for some four or five years, at $10,000 a year. He said he planned to retire. His basis in the stock, as I understand it, was negligible. We said we would work one out with him, and we worked one out with him at $21 a share that was agreeable to him. You have a copy of it now, but I think it was 30% down and then a pay-out over the next eight or nine years.

During dinner he said, "My daughter wouldn't be interested in this long term pay-out, but I may be because the notes would pass through my estate so I wouldn't pay any capital gains tax on it. It would come under the estate tax rates." This was fine for him because he said he had enough money with his consultation agreement with the company to go forward.

He called his daughter from Cincinnati while we were at dinner, came back, and said, "Will you pay her cash?" We said, "Certainly." He told her that we would pay cash at closing for her shares. He said, "She is satisfied with 21. I think you are the kind of people that the company should have acquire it, that you are young, you have some lines of credit, you have some ideas, and you will add something to the overall direction of the company."

We thanked him very much and asked him if he would communicate our offer to the board and to the rest of the shareholders. He said he would do that and he would recommend it.

At that time had I thought that it were important one way or another, I would have spelled it out, but I feel that an oral offer is as good as a written offer. I was committing myself and my associates when I said we would pay.

I understand -- Mr. McCallum reported this to me --

that after he had dinner with us he flew out the following morning, that on the day of the 22nd of March he did tell the board of directors and the other shareholders that he had reached an agreement with us, his daughter had reached an agreement with us, that we would pay $21 a share in cash, or however the shareholders wished to receive it, and recommended that they accept it.

/On the 21st, going back a day, the Thursday of that week, Sidney Pepper called me and said he was in Rumson, New Jersey, with Mr. Eberle and Mrs. Arlinghaus, that Mr. Eberle would stay over to meet with me, and when could I come to New York. I said, "Well, I am anxious to proceed with this thing. We haven't gotten a counter offer from you. I don't know where we are. I'll come to New York as soon as it is feasible and we can arrange it. I wouldn't want Mr. Eberle to stay any longer than necessary."

He said, "Fine. Eberle's here; we will make an appointment."

So I talked with Mrs. Arlinghaus; I was introduced on the telephone by Mr. Pepper. Mr. Pepper talked presumably with Mr. Eberle, got back on the telephone, perhaps it was an extension, I'm not sure, said that Mr. Eberle was staying at the Americana Hotel, he gave me his room number, and he said both Mr. Eberle and Mrs. Arlinghaus would be glad to meet with

me the following Monday in New York.

I said, "Fine; I'll come in Sunday night. I'll meet you whenever you say." He said, "I think the most central location will be Mr. Eberle's room at the Americana Hotel."

That was Thursday. Friday Mr. McCallum presented our offer to the board. I think Mr. McCallum called me to report that he had done that.

All day Friday went by and I hadn't heard from Pepper, Arlinghaus, or Eberle, and Saturday I was down in my office. About 11:30 I was thinking about leaving, concluded that I had better confirm something. So I placed a person-to-person call to Mr. Eberle at the Americana Hotel, and was advised that he had checked out. I tried Mr. Pepper's office and got no answer. I didn't know his home phone. I believe I tried Information but it was a little difficult in New York, so I remembered that Mr. Pepper had said he was at Mrs. Arlinghaus' home in Rumson, New Jersey, so I thought I would see if I could locate an Arlinghaus residence in Rumson. I didn't want to fly to New York just to turn around.

So I called about 11:30 Mrs. Arlinghaus and said I had had a little trouble in locating Mr. Eberle but I would like to confirm our meeting in New York. She said she was interested. This was the 23rd of March. She said she would

meet with me, where was I staying. I said I usually stay at the Plaza, so why don't we meet there at a time that is convenient for you.

She said fine, she would come in town maybe around eleven o'clock.

While we were on the telephone she said her daughter, Alix, who is 20 or 22, wanted to come to the luncheon. I said, "Fine, I'll be delighted to meet her." Sat March 23

Thereafter I went to a late lunch, came back to find a note on my desk that about 2:45 or 3:00 dclock that day Mr. Pepper had called me from a number I didn't recognize, and left an operator number. So I returned the call. Presumably it was his residence. He said Mr. Eberle thought my figure was too low, and had gone back to Florida.

I said, "Well, what is his counter?" He said, "He's gone back to Florida; you can go down there and see him if you want to. I don't think Mrs. Arlinghaus will be interested."

I had just reached the conclusion that maybe I was concerned about getting the whole story, and I decided not to say anything about my conversation with Mrs. Arlinghaus. I thanked him for his information.

Thereafter I called Mrs. Arlinghaus again that day and said, "I have just gotten this communication from

Mr. Pepper. Has the situation changed from our morning conversation or do you want me to come to New York, and shall we talk about the sale of your stock?" She said she would be delighted to meet with me and intended to.

Next day, Sunday, March 24, I flew to New York late in the evening. The following morning I did a couple other things that I had to do there, and then Alix Arlinghaus called me, I believe from her place of employment, to say that her mother was there, they would be a little late, but would I please reserve a table. So I reserved a table -- this is Monday, the 25th of March -- at the Plaza for lunch.

Mrs. Arlinghaus came alone, introduced herself, and we started a pleasant conversation. Then Alix Arlinghaus arrived, and I was introduced to her.

We talked for a while in generalities. I gave her my interest and the background and why I was interested in acquiring the company at all. Then I think we were finishing our drink and were just getting ready to order when Mr. Pepper came into the dining room and sat down with us. I hadn't expected him, but I had no concern. I was really glad to see him because I understood that he spoke for a greater number of shares than even Mrs. Arlinghaus.

We talked a good while over lunch and then went to my suite where we could sit down and relax and talk at greater

length. I told her that McCallum and his daughter had agreed to accept our $21 offer. I told her that as a point of departure I had worked up an installment purchase plan on the same basis that McCallum had agreed to. Frankly, I thought I was doing something that she was interested in because of the earlier suggestion of her counsel. I had worked up three variations of it. I believe one variation shows her receiving as much as a half million dollars cash and the rest paid out in lesser amounts of cash depending on how you break down the five entities that she represents.

In our conversation she looked at it. She said she wouldn't be interested in being paid in anything more than five years. She would want to be paid in five years or less. I said this was no real problem.

We talked at length. I said, "Just tell me how you want to be paid, or what you want to be paid." I couldn't reach an area in which to negotiate. I had made an opening offer. It wasn't accepted, it wasn't put down; no other price was suggested.

During the course of the conversation I believe it was Mr. Pepper who said, "We have a 100% buy-sell agreement between the shareholders. What if we can't get some of the minority shareholders to go along with your offer?"

I said well, I had indications at that point that

everybody but Mrs. Arlinghaus and Mr. Eberle would accept our offer but if there were a problem certainly I could talk about it and we would be interested in an asset acquisition.

Mr. Pepper asked me twice during this conference in my suite specifically whether I would pay all dollars on closing, and in each instance I answered it would be harder but we will do it if this is the way you want it done and Mrs. Arlinghaus wants it done.

We discussed on the asset acquisition the fact that it was a Delaware corporation, that Mrs. Arlinghaus alone had enough stock that she could have an asset sale if this were her wishes, and if he wanted me to pursue that approach I would, but I felt confident that the minority shareholders would approve of any sale and equitable offer we made.

Mrs. Arlinghaus told me that she had told the executives that she wouldn't sell the company unless the acquiring entity were approved by the executives, and she was delighted that they had indicated their approval and interest in our acquisition.

She asked me if I expected her to make her mind up at that meeting. I said no. We were talking about a lot of money, and I said, "I think you should take any reasonable length of time." She indicated she would like to talk to a financial advisor, and I thought that was fine.

So we parted some time in the afternoon of March 25. I went back to Cincinnati.

I don't think anything of import happened on the Tuesday, Wednesday or Thursday of that week, Mr. Carpenter.

BY MR. CARPENTER:

Q Did you write to her to confirm your offer?

A I did. It is a practice of mine that whenever I have any meeting or conference orally, I will write a thank you note and try to put into it the import of any agreement or discussion reached.

Q I am going to show you a letter dated March 26, 1968, and ask you if that is the letter.

A Yes. This would be the letter I wrote the day after my meeting, when I got back. In it I speak specifically of my offer at $21 a share.

MR. CARPENTER: I am going to offer this into evidence.

MR. ANDERSON: No objection.

THE COURT: Admitted.

(Letter dated March 26, 1968, from Sherman Unger to Mrs. Frank Arlinghaus, was received in evidence and marked Plaintiff's Exhibit No. 11.)

BY MR. CARPENTER:

Q You have just said that there were no further

developments, you thought, for the next couple of days?

A I think I wrote that letter on Tuesday, and on Wednesday and Thursday I pursued my practice. On Friday I hadn't heard from Mrs. Arlinghaus so I called her at Rumson, New Jersey. She said she was still contemplating my offer, that she had set up a meeting to meet with a Mr. Charles Newton, vice president of Chase-Manhattan Bank, the following week, that he was the financial advisor of hers, and would I write directly to Mr. Newton as soon as possible outlining some of the various approaches that we had discussed in our meeting of Monday, the 25th.

Well, I couldn't do it that day because of other commitments, but the following morning I had a secretary come in, and I wrote a letter, airmail special delivery, Saturday the 30th, to Mr. Newton, with a carbon copy airmail special delivery to Mrs. Arlinghaus.

Q I am going to show you a copy of a letter dated March 30, from you to Mr. Newton, whom you described as Mrs. Arlinghaus' financial advisor.

A This is a copy of the letter, and I described him that way only because she told me so.

Q I am going to ask you one question about that and then I will offer it into evidence. Was there any conversation between you and Mrs. Arlinghaus to the effect that your offer

to her was an offer to acquire 100% of the stock at the price that you were offering her?

A Yes. On the March 25 meeting I said we wanted to acquire 100% of the stock, and the question came up about what if a minority stockholder held out because of the 100% buy-sell that they had?

Q Is that what you discussed in that letter? I direct your attention to the first paragraph.

A The first sentence says that we have an interest in acquiring 100%. And I referred to our willingness to pay $21 a share.

MR. CARPENTER: I ask that this be entered into evidence as Plaintiff's Exhibit 12.

THE COURT: It is admitted.

(Letter dated March 30, 1968, from Sherman Unger to Charles Newton, was received in evidence and marked Plaintiff's Exhibit No. 12.)

BY MR. CARPENTER:

Q What was the next development after that, Mr. Unger?

A At that point I thought frankly that we were well down the road to an acquisition, that the only thing left was some amount of dollars, whether $21 or where we were. In an effort to make sure everything was going along all right, I called Mrs. Arlinghaus on Monday to make certain that she had

received her copy and that the copy of this letter that I had sent to Mr. Newton conformed with what we had talked about on Monday. She said yes, she had received it, that it seemed to be the same thing we talked about, that her appointment with Mr. Newton had been changed from Monday to Tuesday but that she would see him early that week and she would ask him to call me directly concerning any questions that he may have.

I told Mrs. Arlinghaus that Monday that I had a tight travel schedule that week. I believe I left that day for, I'm not sure where -- oh, I'm sure. I was either in Toledo or Cleveland, and by Wednesday was in Washington, and managed to stay there through the riots. But on Thursday of that week I called my office and discovered that Mr. Newton had called me at my Cincinnati office.

I then called Mr. Newton at the Chase Manhattan Bank, the number that he had left, introduced myself on the telephone, talked with him for a minute, and he told me that yes, he had met with Mrs. Arlinghaus, he had known her and her husband for a number of years and that she had just received another offer of more money and he wasn't certain what she would do, that he felt that her inclination was to want the person to acquire the company that management approved of, but he didn't know what her decision wo

I asked him if he would tell me what the amount of that offer was. He said he had seen a letter but that he didn't think he should reveal it. However, he felt confident Mrs. Arlinghaus would.

Q Were you prepared to go any higher than your offer of $21 a share, Mr. Unger?

A Clearly. I just didn't want to be a unilateral elevator going up each stage myself and receiving no answer.

Right after I talked with Mr. Newton I placed a call to Mrs. Arlinghaus. She was at home. She said yes, she had just gotten another offer and it was more but she didn't know what she was going to do. This was on the 5th of April, I believe, the 4th or 5th of April. It was on Thursday of that week. She said she would call me in Washington. I gave her my telephone number -- it was on Friday -- and she said it may be late in the evening but I'll definitely call you tonight.

Well, we got caught in that riot situation where telephones weren't working and a number of things happened. In any event, for whatever reason, I stayed in my suite all night but I did not receive a call from Mrs. Arlinghaus. I was able to get out of Washington the following morning, got back to Cincinnati. I knew that the telephones weren't working in Washington so as soon as I got into my office I called

Mrs. Arlinghaus in Rumson. This was the morning of the 7th, now.

She said she had decided to take the other offer. At that time I said, "Will you tell me what it is so I can match it or beat it, if this is possible, if it is within my range." I said, "I am sincere; we would like to acquire the company. We have made our opening offer. We didn't receive anything back from you. If you will tell me what this is, either I will be able to match it or beat it or tell you that we can't do it."

She said, "I don't think I am allowed to." I said, "I don't know of any position where you wouldn't be allowed to tell me what the offer is. Would you please find out from whoever your advisor is whether you can tell me what the offer is so I will have an opportunity to match it or beat it if I can."

She said, "I'll find out if I'm allowed and I'll call you back." And she told me that she was going to some friend's -- she gave me the name of the friend's apartment on Park Avenue -- but I didn't hear from her. I believe that's the last conversation I have had with Mrs. Arlinghaus.

Then on the afternoon of Monday, April 8, I got a telephone call from Bill McCallum and Carl Lenz. It was a joint telephone system, each had a telephone, and they

described to me what they characterized as the outrageous conduct of the board meeting of the 8th of April. Mr. McCallum said he was going to fight, he was going to sue.

I listened, sympathized with him, and said goodby. I talked with my associates, and we remained ready to acquire the company because I had suspected that an asset acquisition of the company qualified to do business in 25 states, with 33 film libraries, would be quite difficult, first of all for the reason that we might run into considerable bulk sales problems. If you weren't qualified to do business in all of these states you would run into certain additional legal problems; nothing that couldn't be worked out, but it would be more difficult.

I analyzed the situation for what I thought it was, and concluded that I had no rights and no options. All I could do was to sit.

From time to time I kept in touch with the situation as it was developing. I had learned that Mr. McCallum really wasn't going to bring suit, and I heard that a Mr. Hough was going to bring the suit.

So at that time I brought together my associates and I said I think maybe I was a bit naive in my negotiation. If we want to go forward I think we should do it in a form that would be eminently clear that no one could attack or

corporation too, along with some of the other executives?

A No, he did not.

Q With whom did you have this understanding?

A That arose, as I indicated in my February conference, with Mr. Lenz, and I believe Mr. Oard and Mr. Vickers. They talked about what the future of the company would be with us. I asked them who the key management people were. I didn't really know. Mr. Lenz said he felt that there were seven key management people that over the years would be people that should in his judgment have the opportunity to acquire an equity.

I said, "Fine. Tell me who they are and we will give you whatever commitment you feel you need on the basis that we will allow them to acquire an equity."

I told him I couldn't, from the knowledge I had at the moment, determine who should get what, but left that up to him.

Q Well, you forwarded to Mr. Lenz this agreement that was to be signed by these people. You didn't have any names in that agreement?

A I had names. I had the seven names that he gave me.

Q Who were the seven names?

A I'm not sure if I can give you all of them. I feel reasonably confident that you will find them in the letter of

February 22. Mr. Lenz, Mr. Vickers, Mr. Oard, Mr. Kater, Mr. DelCoro, and I believe Mr. Cox. I would like to refresh my memory from the exhibit.

Q Well, the exhibit that I have, Mr. Unger, is your letter of February 22 that refers to enclosing copies of an agreement, and the agreement isn't an exhibit.

MR. CARPENTER: I have a copy of the agreement here. Perhaps I should have offered this into evidence, your Honor, as part of the letter. I didn't realize it was attached to the letter.

MR. ANDERSON: I have no objection to having it made a part of PX-9.

THE COURT: Let it be admitted as PX-9A.

MR. CARPENTER: That is my only copy, your Honor.

(Copy of Agreement was received in evidence and marked Plaintiff's Exhibit 9-A.)

BY MR. ANDERSON:

Q This letter refers to Carl H. Lenz, William M. Oard, G. C. Kater, Ralph DelCoro, Richard H. Rogers, George H. Vickers, and F. Kinchelde, Jr., as executives of the corporation hereinafter referred to as executives. Are they the people that you just referred to?

A I don't think they are. I think I put a name Cox, or something, in there.

Q I mean they are the people that you intended to refer to?

A Those were the people that Mr. Lenz said he thought had a right to acquire equity, that's correct.

Q And we are talking about 30% of this new company, or if you bought stock, stock of the old company?

A That is correct.

Q I think you testified while you were talking about the same price you contemplated that it would include any additional cost or expense that you had in connection with the acquisition?

A I believe it is spelled out in the agreement.

Q Plus a proportionate share of the promotional or acquisition cost, if any?

A Is that a question?

Q That is the language in the agreement.

A I testified that the agreement speaks for itself. I don't have a copy of it.

Q Well, you drew it, didn't you?

A That is correct, but I don't remember everything I draw. I am not disagreeing with what it says; I just don't remember what it says.

Q So the executives had an interest in this offer that you were making to the extent that they were given the

opportunity to participate in it?

A No, I wouldn't characterize it like that. It was to my best interest, and the interest of the acquiring group, to encourage the executives to stay with the company. We intended to acquire 100% of the stock of the company.

Thereafter we would have allowed the executives to acquire stock at the price that we had paid for it, plus whatever acquisition cost there may have been.

They told me, and I asked them specifically whether they could participate, and their collective net assets would not have been a substantial part of the purchase price.

Q This offer to acquire 30% of the stock of the company is not broken down as to which person would acquire what percentage, is it?

A I don't believe it is, Mr. Anderson.

Q It in effect gives them an option for a period of one year to acquire the stock at that price, does it not?

A No, it does not.

Q Doesn't it say so in the last paragraph?

A It says this agreement shall continue in full force and effect. First of all, it wasn't signed. Secondly, it doesn't give them an option. The agreement, I think, speaks for itself. Thirdly, in the cover letter that went with it I think you will find I tell Mr. Lenz I have no knowledge as

to who should get what, and request him to make a recommendation.

Q This agreement was never signed?

A Not to my knowledge. It was never executed, to my knowledge.

Q As far as you know then, Mr. Lenz may never even have talked to his fellow executives about it?

A Well, I think that is probably wrong because Mr. Oard and Mr. Vickers were there. I subsequently heard from Mr. Kater, that knew about it, so I think -- I wouldn't want to say because I know he did talk to some people.

Q Mr. Oard testified this morning and he said the only offer he ever heard from you, if I understood his testimony correctly, was $21 per share. He didn't make any mention of this figure of $23.20 per share that you refer to in your PX-9, which would indicate to me that he hadn't heard of your willingness to go up to $23.20 per share because he said he only heard of $21 per share as being offered by you.

A Is that a question, sir?

Q Yes. Wouldn't that indicate to you that he hadn't heard of this proposal that you made in your letter of February 22, 1968?

A It would indicate to me only that he didn't remember it when he testified. I don't know what he heard of otherwise, Mr. Anderson. I can't testify to that.

in our agreeing to purchase the company.

Q Now, when you say "purchase the company," you are talking about Modern Talking Pictures Service, Inc.?

A Modern Talking Pictures, yes, sir.

Q Now, at the same time were you considering the purchase of this other company, this Teleservice Corporation?

A When Mr. Weil contacted me, he proposed that we purchase Modern Teleservice, Incorporated, and after I indicated our interest to do so, he told me that incidentally it may also be possible to discuss Modern Talking Pictures after we had made the deal for Teleservice.

Q All right. And with whom did you negotiate for the Teleservice?

A I negotiated through the medium of the broker.

Q Of the broker?

A That's right.

Q And that transaction contemplated the acquisition of all of the stock of the company, did it?

A No. Primarily the initial discussions were for the assets.

Q The assets?

A If you want to, I will --

Q I don't want to clutter the record too much, but just briefly can you tell us what you acquired?

for this business?

A Well, I would put it this way: I think it's a very high price based on the balance sheet of a service company and pegged at 14 times earnings without a substantial balance sheet and taking a risk whether or not the Modern contracts could be assigned. I would say it's a very high price and a very fair price.

Q Reference has been made to this escrow fund that was going to be put up. Who suggested that escrow fund, or did you require an escrow fund?

A We told Mr. Pepper that we would require some kind of an escrow. We did not stipulate what the escrow should be. The escrow was acquired to guarantee the warranties, and the warranties were primarily concerned to guarantee two things on the balance sheet: one, the accounts receivable, and the assets which appeared on the balance sheet.

We understood right along that in connection with the acquisition of assets, the company would not warrant their ability to have the Modern learning contracts transferred to a successor company; specifically, the Chem Study which was referred to previously and the Physics Study which comprised the major portion in sales and earnings of that particular department of the company. This was never intended to be -- The escrow was never intended to guarantee the

assignments.

Furthermore, I told the minority stockholders that if we were to purchase the stock, that we, as far as we are concerned, would be satisfied with an escrow between $300,000 and $400,000, and I suggested $350,000, and I furthermore subsequently agreed with Mr. Pepper that in the event that we would be able to purchase all of the stock of the company, that not only would we be satisfied with the escrow of $350,000, but we would also make all of the funds of the purchase or the money which we would pay available to the minority stockholders in full so that none of their funds would remain in the escrow fund; that the only funds which comprised the escrow would be derived from the proceeds which would be received or paid to Mrs. Arlinghaus and Mr. Eberle representing roughly 70% of the outstanding stock of the company.

Q So that was in the event you bought stock rather than purchased assets?

A Under assets, it's impossible.

Q Under the asset thing, you need the protection of some escrow?

A No; we cannot make separate deals.

MR. ANDERSON: You can't make separate deals, right. That's all. Cross-examine.

THE COURT: I think we will recess before you begin, Mr. Carpenter.

We will take a ten minute recess, gentlemen.

(Brief recess.)

C R O S S - E X A M I N A T I O N

BY MR. CARPENTER:

Q Mr. Sonderling, I'm going to show you Plaintiff's Exhibit No. 1 which has already been identified and which appears to be a copy of a letter signed by you. Did you actually write that letter and sign it?

A I did indeed.

Q After you wrote it and signed it, Mr. Sonderling, what was done with it?

A I sent one copy to Mr. Pepper and one copy to Mr. Weil. I think the original went to Mr. Weil, if I'm not mistaken, and a copy to Mr. Pepper.

Q Mr. Weil is the Corporate Finders man?

A That's right.

Q And did you mail any copy direct to the board of directors?

A No, I did not.

Q Did you take any steps thereafter to see that it was brought to the board of directors' attention?

A No, I did not.

Q Do you know when it was brought to the board of directors' attention?

A I do not.

Q Was it mailed to Mr. Pepper on or about the date that it is dated; namely, March 20?

A It was mailed either the same day or the following day.

Q And did you receive an answer from Mr. Pepper dated March 22?

A Yes, that's right.

Q Did you receive that a day or two after March 22 or on the 22nd?

A Around the 25th, I believe.

Q All right. Now, you have referred to the fact that the possibility of an acquisition of Modern Talking Pictures was first brought to your attention by Bear, Stearns, and then I think you said the following year by an organization known as Corporate Finders, Mr. Weil.

A No. I said it was either Leidesdorf or Bear, Stearns, and as I recollect it, I think the information came out of the Chase Bank.

Q Now, can you tell us whether or not your company has arranged for the payment of any kind of finder's fee to

any of these organizations?

A Yes, we have.

Q And who are you paying a finder's fee to?

A Corporate Finders.

Q And that is a payment by you, not coming out of the purchase price?

A That's right; Sonderling Broadcasting.

Q And can you tell us the amount of that finder's fee, please?

A Yes, sir. It's 4%.

Q It's 4% of the $2,800,000?

A That's right.

Q So that as far as your company is concerned, Corporate Finders is the group that did the finding and arranged the wedding?

A That's correct.

Q Are you familiar with an organization known as Commonwealth Development Corporation?

A Yes, sir.

Q And what is that organization?

A As far as I know, it is a company which is also in the business of effecting mergers and its headquarters are in Philadelphia and it's either wholly owned or operated by a man by the name of Harry Shapiro.

Q What, if anything, did they have to do with bringing your corporation together with Modern Talking Pictures?

A I would say that the relationship is one whereby Mr. Shapiro was actively engaged in trying to find a suitable-- acquire a purchaser for Modern Talking Pictures, and that he submitted the proposal to Mr. Weil and Mr. Weil knew our company was interested in making acquisitions, so therefore this is the sequence of the link, where it went from Shapiro to Mr. Weil to me.

Q I see. So the deal came to the attention of Mr. Weil through somebody in Commonwealth Development, as far as you know?

A That is my understanding, but this is secondhand knowledge. I cannot testify to it from my own knowledge.

THE COURT: Before you leave that, Mr. Carpenter, if you are going to, I want to ask a question:

BY THE COURT:

Q Who is Mr. Weil? Tell me again.

A Mr. Weil is Corporate Finders -- what is the exact name? It's Corporate Finders & Consultants, or something like that.

Q And your finder's fee of 4% is being paid to Corporate Finders, is that right?

A Yes, your Honor.

Q Have you had any relationship or any dealings at all with Commonwealth Development Corporation?

A Only insofar as they also are -- they operate in the same function in connection with the merger of Modern Teleservice. They represented Modern Teleservice also, and I met Mr. Shapiro originally when we completed the deal to acquire Modern Teleservice.

THE COURT: I see.

THE WITNESS: The correct name is Corporate Finders Consultants, Incorporated.

BY MR. CARPENTER:

Q All right. Did Commonwealth Development have any contact with your organization directly before you wrote your letter of March 20?

A None. I didn't know if it existed.

Q I didn't understand some testimony you gave with respect to your proposal on an escrow agreement, Mr. Sonderling.

You said, I think, that as far as an escrow agreement was concerned, you thought $350,000 would be adequate. Was that with respect to the asset purchase or the stock purchase or both?

A Either way.

Q Either way?

A Well, let me clarify that:

BY MR. ANDERSON:

Q Mr. Pepper, you are the Sidney Pepper that is referred to as a defendant in this action?

A I am.

Q Where do you reside?

A Great Neck, New York.

Q And what is your primary occupation?

A Attorney.

Q And how long have you practiced law?

A Since 1925.

Q Where?

A In New York City.

Q And there has been testimony as to whom you represented in connection with this case. Whom do you represent as an attorney?

A As an attorney, I represent Mrs. Arlinghaus, the Arlinghaus estate and the Arlinghaus children indirectly through Mrs. Arlinghaus.

Q As custodian?

A As custodian.

Q How about Mr. Eberle?

A And Mr. Eberle as trustee and also as an individual.

Q Right. Is that --

A I also represent Mr. Bogaards. I assumed I represented

Mrs. Schlereth and Miss Cox.

Q Incidentally, with respect to Miss Cox, who is Miss Cox?

A She is no relation to Edmund H. Cox. She was the former treasurer of our company.

Q And a stockholder?

A And a small stockholder.

Q Now, you are also attorney for the company, are you not?

A I am.

Q And you have been for what period of time?

A Since the inception of the company.

Q Which was when?

A 1937.

Q And in that connection do you receive a retainer from the company?

A Yes.

Q And what does that retainer cover?

A Ordinary legal services, not extraordinary.

Q Does it cover anything like the sale of assets or --

A None at all.

Q You would bill for that separately?

A Separately.

Q I will start off with the receipt by you of this

letter, or the copy of the letter which was sent or dated March 20, Plaintiff's Exhibit No. 1, to the directors of Modern Talking Pictures Service, Inc.. Mr. Sonderling testified that he sent you a copy of that letter. Did you receive a copy of that letter?

A I did.

Q And about when did you receive it?

A It came in late on the 21st in my office in my absence.

Q Yes. When did you first see it?

A This particular copy?

Q Yes, that copy of that letter.

A I can't say. It was probably sometime in the following week.

Q Not --

A I wasn't in the office. I was otherwise occupied.

Q Now, there was a meeting --

A I saw a copy. Mr. Steve Weil handed me a copy on the 22nd.

Q And where did that take place?

A At the Americana Hotel.

Q Was that before or after your directors meeting of the 22nd?

A Before.

Q Before. Had you an opportunity to consider this offer prior to that time?

A No -- consider that document? No. I knew in general about the price figure. This, incidentally, was not an offer to me. It has been referred to as an offer, but it's far short of being an offer.

Q Now, following the receipt of that document, what did you do in connection with that proposal, if I can call it that, that was made by Sonderling?

A I didn't bring my diary, but I assume we had conferences the following week.

Q With whom?

A I met with so many people; my principals, probably the brokers, and I think Mr. Sonderling was absent that week.

Q What were these conferences about?

A About whether or not we should proceed with the matter and what form it would take.

Q Now, did you resolve anything in this period of time?

A No.

Q Who requested this special meeting of the directors to be held on April 8?

A Mrs. Arlinghaus and Mr. Eberle.

Q Had they resolved by that time what they wanted to do?

A Yes.

Q And what was it that they wanted to do?

A They wanted to adopt the necessary legal steps, take the necessary legal steps in line with a desire to consummate the transaction.

Q And they owned between them -- well, Mrs. Arlinghaus, I take it, owned the majority of the stock.

A She owned 54%, approximately.

Q And Mr. Eberle wanted to do it too?

A Right.

Q Did you talk to any of the other stockholders prior to this directors meeting on April 8?

A To the best of my recollection, I talked to Harry Bogaards; in fact it was probably every night. He lives near me. We would talk at night when I was home.

Q So you had resolved in your own mind what the legal procedure was that you should -- Why did you decide to go through a sale of assets route rather than a sale of stock route in connection with this proposal?

A We have a buy-back agreement which was saddled on us by Western Electric Company back in 1936 when we first became the owners of the Modern Talking Pictures Service, Inc. That was part of our certificate of incorporation as originally drawn. We modified it and put it in a separate contract.

Under that agreement, no one stockholder could part with his stock without offering it to the others. The objective was to keep competitors from coming in and learning the financial details and operational techniques of our business. Mr. Arlinghaus was almost obsessed with a fear that competition would be able somehow or other to get access to our financial data. That was the motivation.

Q Now, did you resolve prior to the meeting of April 8, the directors meeting of April 8, that you couldn't get the consent of all of the stockholders?

A Well, I knew I couldn't get all of them. Mr. Huff had indicated very positively that he would not consent. Miss Broglie, who works close to him if not with him, had indicated likewise. Mr. DelCoro said he was a businessman and he wanted to talk to independent counsel, and I didn't feel it was in my province to try to give him any extra inducements.

Q Now --

A You wanted to know what made us try the stock route first?

Q Yes.

A We are qualified to do business in roughly 22 states and two Canadian provinces. A sale of assets would call for the change of name of the present corporation to some -- any

kind of a name and a simultaneous qualifying of a new corporation to do business in those jurisdictions. The expense of that transaction, according to the Corporate Trust Company, is approximately $10,000 minimum.

In addition, Mr. McCallum stated that a lot of our Modern Learning Aids, educational films, which were entered into with affiliates of the National Science Foundation, a government agency, could only be assigned with consent of the affiliates, which would be the regents of the University of California and M.I.T. and similar bodies, astronomical societies.

All these pictures have been made with government money, and the government doesn't operate very quickly when you come to request a consent, so I was told.

Q Well, let's go on.

So you decided to follow this sale of assets route as the only feasible route, so you had your meeting of your board of directors, right?

A Correct.

Q Now, what did you present? Were you the one who made the presentation of this offer to the board?

A I did.

Q Can you tell us briefly in substance what you told the board on April 8?

A The first order of business, having in mind Section 337 of the Internal Revenue Code, was to propose that the corporation adopt a plan for its liquidation and dissolution. The objective, as I told the board, was to avoid a double tax, a tax to the corporation and then a tax to the stockholders. With such plans being adopted, the corporation would escape taxation on the sale of its assets, in my opinion. I made that proposal. Mr. McCallum objected. The management group joined in the objections. The management group was Mr. Lenz and Mr. Oard.

There was a lot of delay, a lot of bickering, and I insisted that the matter be put to a vote. It was put to a vote, and the resolution was carried by a five to three vote.

The next proposition was to consider a proposal for the sale of the assets. On behalf of Mr. Eberle and Mr. Arlinghaus who were present in the room, I proposed the resolution which is incorporated in my draft of the minutes.

The first time I proposed it, Mr. Vickers did not get all the terms. I was asked to restate it. I restated it orally, and in my impression, accurately in accordance with the minutes.

Mr. Vickers is not a stenographer. He asked me to slow down. In my opinion, he made mistakes in transcribing it.

So far as Mr. Oard is concerned, when he says he saw Mr. Vickers write it, he was sitting at least five feet away from him, and all he could see was that Mr. Vickers was taking notes.

Q Well, let's not get into all of these fine details.

A In any event, in accordance with the practice of over 30 years, I have reduced the minutes to proper form for insertion in the minute book.

Q Well, after all, this really is a very minor discrepancy in this resolution.

A There is a controversy over the word, "charge." That should have been "change." That should be, "with changes requested by Sonderling's counsel." I tried to explain that to Mr. Vickers, but apparently he had issued a copy of his notes to Mr. Hough or his counsel, and he refused to make any change whatsoever.

Q And the other minor correction was "or." You thought it was "or," and he insisted it was "and," Mr. Eberle and Mr. Cox, and your recollection was that -- Well, I'm sure that this lawsuit is not going to hang on that language.

A Yes.

Q So in any event, that resolution was adopted?

A Yes.

Q And then you went on with the other business of the

meeting, changing the officers, and so forth, which is referred to in the minutes?

A I moved the election of three vice presidents because I had failed to get any cooperation from management. I told them -- this is my quotation to them -- I wanted new officers elected in case these fellows suddenly became paralyzed in their right hands, and the three new officers including myself were elected as vice presidents and assistant secretary to serve without compensation.

Q Now, let's go back to one thing on this resolution with respect to this broker's fee, $200,000 plus the $100,000 to yourself. How was that arrived at?

A You will have to indulge me a moment.

Q Yes.

A Last May Mr. Pitenour and Mr. Lipsky, the president and executive vice president of Modern Teleservice, had been rubbed the wrong way by one of our directors, and they said, "We are quitting."

They came along with a proposal to buy all of the stock of Modern Teleservice from its shareholders. They made an offer of $15. That offer was accepted by every stockholder including Mr. McCallum, Mr. Bogaards and Miss Schlereth in writing. The only stockholders who didn't accept were Mrs. Arlinghaus and Mr. Eberle.

After a little trading, I got the offer increased to $20 a share. We had a contract signed. We had a closing arranged. At the date of the closing, Mr. Ritenour's angels couldn't raise the extra $5 a share, and they defaulted and forfeited a deposit.

Mr. Ritenour was quite disappointed. We left the place, and I proposed in a restaurant that the problem could be overcome if I could show them how they could achieve their objectives of getting capital gains. I said I had a suggestion. If they would be good enough to entertain it, we could then waive the risks involved.

In brief, the suggestion was that the stockholders give them the opportunity to purchase 40% of their stockholdings at $10 a share with an agreement that if Mr. Ritenour could not get them the equivalent of $20 a share minimum within one year, the selling stockholders could rescind the sale to Mr. Ritenour and Mr. Lipsky. (Mr. Ritenour could not come up with the down payment for a full 40%, and he offered me the opportunity to come in. His motivation was that I would not charge the corporation any legal fee.)

Now, I don't know whether your Honor is familiar, but the practice on the street in acquisitons is to pay a price based upon a multiple of earnings. If I charged the corporation a fee and Mr. Ritenour valued my services as

in excess of $100,000 in connection with the Teleservice sale, that would reduce the earnings of the company to somewhere, according to the then projection, of about $150,000. Multiplying it by the market average of ten times earnings, we could only get a million and a half for the company.

If my fees could be covered without having the corporation pay it, then there would be that much earnings in the company. At the moment in question, we anticipated $250,000 projected earnings, and that would mean a price of at least two and a half million dollars for the company.

Well, I was not interested in ordinary income. It would put me in the 70% bracket and leave me with very little. The suggestion was made by Mr. Ritenour that they would yield part of the stock to me. I put it up to all the Teleservice stockholders, and everyone with the exception of Mr. McCallum agreed in writing with a full disclosure that my wife could have an opportunity to purchase stock on the same terms as Mr. Ritenour. I did not purchase any. I have been the victim of a coronary, and I just didn't know how long I would last. I wanted to do something for my family. That's why my wife is a stockholder.

Having made that agreement in writing -- and Mr. Vickers had the opportunity to look at it, to study it, to shoot at it -- He had more than twenty minutes at Penn Station.

He had the papers in his custody.

In any event, the documents were signed, the purchase price was paid, the stock was transferred, and then I undertook to find a buyer for the Teleservice Company. With some help, I managed to locate Fuqua Industries, and Fuqua offered us share for share which was then roughly $3,600,000 for Teleservice.

At that time in question, Fuqua stock was selling at 60. It went to 80. Our earnings declined with a slump in the television business and all advertising in radio. Fuqua knew about it, but they decided that they would do, if I may characterize, a little chiseling. So two days before the closing, they said they were not going to close.

We were confronted with a catastrophe. Our stockholders became exceedingly despondent. May I say that Mr. Ritenour walked away, took a three-week vacation. I was left holding the bag.

I then remembered that last September or October, through Mr. Harry Shapiro and Steve Weil, I had talked to Sonderling Broadcasting, and Mr. Sonderling, whom I had never met in 1967, expressed a willingness to fly to New York and to discuss a four and a half million dollar price for Teleservice. I could not get Mr. Ritenour, the president of Teleservice, to consider Mr. Sonderling's offer. Mr. Ritenour said, "I have given my word, and a handshake deal is good

enough for me." I respected it.

I told Mr. Sonderling we could not -- I told the brokers we could not proceed with any deal with him.

On March 10, 1968, after the Fuqua deal terminated, I got a hold of Mr. Shapiro and asked him whether he could revive an interest in the Teleservice deal. He came back with the statement that he would work on it provided he had it exclusive. He said he didn't want us to run out on him as Mr. Ritenour had done in the preceding year.

Mr. Ritenour was asked by Mr. Shapiro what commission he would get, and Ritenour having in mind that Fuqua then was only willing to pay $2,200,000 and that Mr. Ritenour was willing to take $2,800,000, very glibly said, "You can have anything you can get over $3 million."

Well, that disturbed me. But we were afraid to cut it down to 5% because that might induce Mr. Shapiro, if he was very friendly with Mr. Sonderling, to take $2,800,000, and we would net substantially less than $3 million. So we said, "All right. You can have your commission not to exceed 10% on the excess over $3 million." And to our astonishment, he was able to get an offer of $3,300,000.

That is how we got started on it. That deal was consummated fairly quickly. We were worried that Mr. Sonderling might change his mind. Our earnings were -- It's closed,

and I can tell you that. Our earnings were declining. The advertising business was bad. Mr. Sonderling knew it. Everybody knew it. We didn't, as far as I know, make any representations to him to the contrary.

Mr. Sonderling, for reasons which I understand, was very anxious to buy our company. It was his first major acquisition. With it, I was told he could probably go places in developing a growth company. He did. We sold to him quickly. There was no contract made until the afternoon of April 8.

May I say this: That I left the Modern Talking Pictures directors meeting on April 8, rushed downtown, had no lunch, had no dinner. This was the eve of the King funeral. We were afraid all hell would break loose. Mr. Becker had been caught in his Washington office with riots all around him. His secretary ran out. We had a problem of getting the contract typed.

Now, against that background, I was jittery. I don't know how the others felt, but I was afraid that we would lose the deal if any rioting broke out. Moreover, the Sonderling chain catered to -- had radio stations, you might call it, that were catering to Negroes, and I didn't know what they were going to do to their properties. I was just afraid.

We knew that the banks were going to be closed on April 9, so we rushed over to Jersey City, paid the people in the Corporation Trust Company overtime and arranged for a closing there, the issuance of stock, and I was afraid to carry that stock around with me that night, so we arranged for bonded messengers to deliver it to my office the following morning.

The contracts were completed the following morning. Mr. McCallum rushed down to get his share. I still have Mrs. Arlinghaus' share. She went abroad again. She is not here today because she is on her way back from Europe right now. She will be back Friday.

Mr. Eberle has a domestic problem. His wife has been critically ill. She suffered a coronary last night. He has been upset. We asked him if possible to sit here and see this thing through. He did, but the man is not himself understandably, to me. If I may digress, I must admire him for doing what he did.

Now, that's the picture. Now, having wrapped up the Teleservice deal, Mr. Shapiro brought up the question of Sonderling being interested in a second company. Fuqua Industries had been interested in a second company. The companies had been commonly owned and commonly operated. They were divided because of labor problems that confronted the

company, and they operated successfully. Mr. Ritenour did a wonderful job. I can't say the same of Mr. Lenz and his management team.

So here am I as a director representing Mrs. Arlinghaus, a widow, and her children and Mr. Eberle, a nonresident somewhat sick. He has had a couple of heart attacks. And I'm dealing, if I must say it, as I told these directors, with a group who, as stated by me at the meeting, from the day following Mr. Arlinghaus' death, before he had even been put underground, had arranged to get financing to buy out the widow's stock for a lousy $9 a share pursuant to the buy-back agreement.

Now, I told them that they would have to wait until the estate was closed. They had been after me during the three years following that asking when am I going to be able to sell them the stock. I put them off.

Well, there came a day when I couldn't do it. They learned through Mr. Vickers or otherwise -- Mr. Vickers was the corporate treasurer, and he did Mrs. Arlinghaus' tax work, and he knew what was going on. In fact I confided in him thinking that he was on our side. I won't make any further comment about that. So he knew that I had closed the estate tax.

The next thing I know is in the summer -- Well, let

me take that back, your Honor. In May of '67 I gave Ritenour and Lipsky the opportunity to buy in. Following that, I discovered through some informant that management spent a week in Chicago negotiating for the sale of the company to Bell & Howell. Bell & Howell somehow was informed that I represented the controlling stockholders, and if they wanted to buy the company, they would have to talk to me.

They made repeated efforts to buy the company from me. I put them off at the request of Mr. Arlinghaus. Their offer was $3,600,000 provided we could deliver a cooperative management team. I offered management the same kind of deal that I offered Mr. Ritenour and Mr. Lipsky in Teleservice. They didn't say yes and they didn't say no. Mr. Lenz said he tabled it. Under that deal, management would have gotten roughly a million and a quarter which would have given my group approximately $2,400,000.

Unbeknown to me, they started negotiating with a lot of people. They then tried to buy the stock from Mrs. Arlinghaus. When I heard about it, I told them they were crazy; they could never get it on their terms. The basic criticism of their terms was that it was too little over too long a period secured by the obligations of our very own company. The tax consequences, in my opinion, were severely adverse to my clients.

Then I was told -- They had a delightful custom. Every Friday they would get a hold of Mrs. Arlinghaus and take her to a restaurant, six men in the management team, and buy her drinks and give her dinner. It has been characterized as "brown nosing" here, and this was a stated policy. Everybody kidded about it. I tried to explain to Mrs. Arlinghaus what their gain was. She didn't want to see it that way.

Finally, Mr. McCallum came up with a scheme that called for the issuance of a new corporate stock to management people. The whole objective, as I saw it, was to take away her 54% control and to reduce it to a percentage under 50%. I told management if they tried to do it -- and there was some doubt in my mind that -- I thought they could do it without a stockholders meeting. I said I would take steps to change the board of directors and to get an injunction. Well, they pledged that they wouldn't try anything without a stockholder consent.

Well, against that background and the emotional strain on Mrs. Arlinghaus -- she suffered from high blood pressure, and Mr. Eberle wasn't in good health -- Then when Mrs. Arlinghaus got this paper from Mr. McCallum, she decided it was time for her to get out of the company. She then communicated with Fuqua Industries and expressed a desire to

sell to them. We were told that they would pay in the neighborhood of three and a half million provided everything about the company was acceptable.

Management was interviewed by the officials of Fuqua, and according to what I was told, they painted a very depressing picture of the future of Modern Talking Pictures Service.

I'm trying to rush it through, your Honor.

Q Please do.

A I chided Mr. Oard about it, and he said, "I can't misrepresent the circumstances of the company to somebody who may be my future employer." I wasn't asking that they lie to the people, but I thought they were carrying their depressing view of the future of the company just too far. That was expressed to us at the directors meetings.

Now, my conclusion, and the conclusion of Mrs. Arlinghaus and Mr. Eberle in our discussions is that there was a campaign on to take away the stock at a bargain price from these two stockholders and perhaps some of the remaining minority stockholders.

In January, we decided that we would have to revamp the board of directors so that these people could not do anything without our full knowledge. We revised the board of directors, had a stockholders meeting, and management pleaded

that Mr. Oard and McCallum be retained. We didn't intend to. We made a mistake in retaining them.

In any event, they were on the board. We had our next meeting after the January meeting on March 22 to declare a dividend. The following meeting was April 8.

Now, at the April 8 meeting we had these resolutions put through on the Sonderling deal. I then requested management to give me schedules to prepare a contract. I had been familiar with the type of contract that Sonderling expected of us.

May I say this: In the Teleservice deal, Mr. Ritenour and Mr. Lipsky personally represented and warranted the representations and warranties that were in the contract, and they were full representations and warranties. None of the stockholders made any representations and warranties.

When we came to this deal, I could not get material for schedules. I told Mr. Becker that I was being sabotaged, in my opinion, and that if I gave him any representations, they would be virtually meaningless. I wanted this deal to be a two year deal for tax reasons. I had to give them some representations or warranties; otherwise they might have trouble in getting bank loans.

The representations and warranties which I had proposed -- I assure you if they can collect on it, I'll be

greatly surprised.

In any event, there are a number of weak points, and they have graciously agreed to allow us $10,000 leeway for unknown taxes a liability for which could arise on an audit.

I'm not making any representations about our outstanding contracts. Nobody in the company seems possessed of the requisite knowledge to tell us what we own. I'm told that it will take two weeks to get an inventory of our assets. We don't know what furniture we have. We don't know what prints we have. We don't know what contracts we have.

Here is a company that has been in business 31 years. There was no question about lack of integrity in management. I did know that they were interested in promoting a deal with Mr. Unger.

Do you want me to go into that, or what?

MR. ANDERSON: I think we have gone into enough detail now. The court indicated he wanted to adjourn at 7:00, or have a dinner recess.

THE COURT: I think we had better. We will recess until 8:15.

(At this point a dinner recess was taken.)

SIDNEY PEPPER, resumed.

DIRECT EXAMINATION (Continued)

BY MR. ANDERSON:

Q Mr. Pepper, I think my last question to you was directed primarily at the payment of this fee of yours of $100,000. Will you tell me what it represents and why it was couched in the manner that it was?

A Well, if it was to be paid by the corporation, the purchase price for the corporation's assets would be reduced in proportion to the reduction in its earnings by reason of the charge against the annual earnings of the current year of the payment to me. Is that clear to you?

Q Yes, it is clear to me.

MR. CARPENTER: Excuse me, Mr. Anderson. If that is the answer to that question, I don't understand whether the question was directed to the Teleservice fee, for which he got stock, or the fee for Modern Talking Pictures, which the corporation did pay in the amount of $100,000.

MR. ANDERSON: I am talking about our case, what we have before the court at this moment.

MR. CARPENTER: Then I move that the answer be stricken as not responsive. The answer apparently was related to the Teleservice fee.

THE COURT: Let's find out.

THE WITNESS: The answer was directed to the Modern Talking Pictures Service fee.

MR. CARPENTER: My confusion arises from the fact that the corporation does pay that fee, your Honor. The $100,000 comes out of the $2,800,000 which is paid to the corporation.

THE COURT: Well, that is a matter of argument, Mr. Carpenter.

MR. CARPENTER: I just thought the witness had confused the question.

THE COURT: That is his answer.

BY MR. ANDERSON:

Q. And this fee represents what?

A For all my services in connection with the bringing about of the consummation of the transaction, or the sale.

Q And that includes all your legal services?

A Correct.

Q And primarily legal services, I take it?

A Correct.

Q If I understand your answer correctly, in order that Mr. Carpenter can understand it, instead of having it paid to you, your fee for legal services and any quasi legal services for the corporation came out of the finder's fee so

it wouldn't be an expense against the corporation, is that correct?

A That is correct.

Q It wouldn't decrease the earnings of the corporation?

A That's right.

Q Now, as a director of Modern Talking Pictures Service, Inc., had you ever received any better offer than this one that is under attack in this lawsuit?

A No, sir.

Q In your talks with Mr. Unger what was the maximum amount that he had ever proposed to pay?

A $20, and then there was some expression of increasing it to $21.

Q Were there other conditions attached to that offer?

A Yes. He wanted to consummate the transaction after the fiscal year figures were in sometime following June 30, when the fiscal year ends, in the light of the then earnings record of the company and the general economic conditions of the business.

Q How long had you been interested in obtaining a purchaser for this company, or of its stock?

A Since the middle of December, 1967, when Mrs. Arlinghaus said I might proceed. I had been trying to do it before that -- let's take it as far back as September --

but then she had told me to stop my efforts for a while.

Q Mr. Sonderling in his testimony indicated that he was meeting what he understood was a price which had been set for the sale of this company. Is that correct?

A We had requested a net figure of $2,500,000 after all expenses, including my $100,000 and the broker's fee.

Q Had you made up your mind as a director, and had your clients made up their mind, that this was a fair price to get for the company?

A Yes.

Q And had you ever been able to match that price from anybody else?

A No.

Q In your judgment, from your knowledge of this company over a period of 30-odd years, was it a fair price to obtain?

A Yes.

MR. ANDERSON: I think that's all I have from this witness, your Honor.

CROSS-EXAMINATION

BY MR. CARPENTER:

Q Had you ever asked that price from anybody else, Mr. Pepper?

A Yes.

Q Who?

A Fuqua Industries.

Q How about Mr. Unger?

A I didn't ask Mr. Unger for any price.

Q Did you ever mention the price at which the corporation could be sold to Mr. Unger?

A I don't believe so.

Q Whom did you mention this price to in Fuqua Industries?

A I didn't, to the best of my recollection, request it. We hoped that we could get it from Mr. Tom Hennessy, executive vice president of Fuqua Industries.

Q I must have misunderstood you. My previous question was did you ever ask this price from anyone else. Let me repeat that question now. Did you ever ask this price from anyone else other than Mr. Sonderling?

A Only insofar as it came up in discussions with Fuqua Industries, that the price would have to be $2,500,000 minimum.

Q And you told Mr. Hennessy, of Fuqua Industries, that the corporation could be sold for $2,500,000?

A We couldn't get a concrete offer from him. We didn't get as far as discussing the exact price because he couldn't get the cooperation of management.

Q The answer to my question then is no, you did not ask this price of Mr. Hennessy, of Fuqua Industries, is it?

A In so many words, no.

Q Mr. Pepper, I had a little difficulty following the time sequence in connection with your description of your acquisition of Sonderling's shares through your acquisition of Teleservice shares. Could you please clarify this for me?

It is my understanding that Mr. Ritenour and Mr. Lipsky, two executives of Teleservice, had made a proposal to Teleservice to acquire their stock at originally $15 a share, and thereafter at $20 a share?

A Correct. That was in May of 1967.

Q Was it after that that you acquired your 10% interest in Teleservice?

A My wife acquired it.

Q And your wife acquired that interest at $10 a share, is that correct?

A Right.

Q After $15, and then $20 a share had been offered by Mr. Lipsky and Mr. Ritenour?

A Yes.

Q Did the estate which you represented, of Frank Arlinghaus, participate in the sale of stock to your wife at $10 a share?

A Yes.

Q Did the custodianship which you represented participate in the sale of stock to your wife at $10 a share?

A No.

Q Did Mrs. Arlinghaus, your client, participate in the sale of stock?

A Yes.

Q And this stock was sold at $10 a share to Mrs. Pepper following offers at twice that price?

A Which were never consummated.

MR. ANDERSON: I object to this question because the testimony was that they weren't able to go through with these offers.

BY MR. CARPENTER:

Q They were able to go through with the $15 offer but not the $20 offer?

A No, they didn't consummate any offer.

Q How much profit did Mrs. Pepper make as a result of this acquisition of stock?

MR. ANDERSON: I object to that as wholly irrelevant and immaterial to this case. What does that have to do with this case? We are not dealing with the sale of Teleservice Corporation. We are dealing with the sale of assets of an entirely different corporation.

MR. CARPENTER: Your Honor, I think the relevance of this to this case is going to appear in just a moment because I am going to tie this in with an inquiry about a similar proposition that was made for Modern Talking Pictures, and I am showing an intention.

THE COURT: On your representation that you will connect it up, I will permit it. If you don't, I am going to order it stricken.

THE WITNESS: She hasn't made any profit except to the extent that she has sold 400 shares.

BY MR. CARPENTER:

Q How much more is the Sonderling stock which she acquired as a result of this worth than what she paid for it?

A I can give you the market quotation and you can make that calculation. Whether I could get that price I don't know.

Q Is the market quotation around $42 or $43 for the Sonderling stock?

A I think it was that around Friday.

Q So we are talking about a profit of somewhere between $300,000 and $400,000?

MR. BECKER: Mr. Carpenter, do you want to know what the facts are?

THE COURT: Wait a minute. If you want to confer

with counsel, ask the permission of the court and I will grant it.

BY MR. CARPENTER:

Q Do you know?

A I haven't made any computation.

Q But is it in that neighborhood, $300,000 or $400,000?

A No.

Q How much do you think it is?

A That depends upon the taxes, and a lot of other problems.

Q Apart from taxes how much is the profit?

A I don't know. I haven't made any computation.

Q Then when you say "No" you really don't know?

A I haven't made the computation.

Q Did there come a time when you offered a proposition similar to the Ritenour-Lipsky-Pepper proposition which you described in the Teleservice Corporation, to the management of Modern Talking Pictures?

A Yes.

Q What was the proposal there?

A Substantially identical.

Q Were you also to get 10% there?

A Yes.

Q And was the stock to be sold at $10 a share to you?

A Yes. I don't know whether I would have gotten it, but it was to be sold.

Q To you or to your nominee?

A Right. To my wife, let's put it that way.

Q Was that stock also to come, to some extent, that is, to the extent of 40%, from the estate which you represented?

A No.

Q Was the estate to contribute that stock?

A Contribute something.

Q To the extent of 40% of its holdings?

A No.

Q As you presented the proposal to Mr. Card, wasn't it that the estate would contribute 40% of its holdings?

A No. I worked it out in writing, and I believe that Mr. Lenz had the written documents.

Q Do you have those documents with you?

A I have copies.

Q May I see them, please?

(Witness hands document to Mr. Carpenter.)

MR. CARPENTER: I am going to offer this into evidence, your Honor.

MR. ANDERSON: May I see it?

(Document shown to Mr. Anderson.)

BY MR. CARPENTER:

Q When was this proposition discussed with Mr. Oard? The date of the document you have shown me is October 7, 1967.

A It was discussed in September, 1967.

Q And the stock was then to be sold to you by the estate, I think you said, and by Mrs. Arlinghaus, and by other stockholders, at $10 a share?

A Yes.

MR. ANDERSON: I object to this as totally irrelevant and immaterial. This proposal was never followed through, never accepted. I don't see what bearing it has. And I submit that Mr. Carpenter, in spite of his protestation of connection, has not shown any relevance.

MR. CARPENTER: We are talking about two different things now, your Honor.

THE COURT: On the earlier one the answer was that he didn't know, and I think that answered that. Now on this one, Mr. Carpenter?

MR. CARPENTER: With respect to my question about the Teleservice deal, I said I would tie this in by showing that a similar deal was offered here, as a result of which enormous profits were going to accrue personally to Mr. Pepper in the resale of the stock.

THE COURT: I admitted it on the understanding that

you would connect it up. You asked him if he knew what the profit would be and he said he didn't know. So that ends that phase of it, as I see it.

MR. CARPENTER: All right.

THE COURT: Now we are with this offer. Before you go into that, have you completed laying your foundation for the admission of this document?

MR. CARPENTER: Yes. The document is offered to show a course of conduct on behalf of Mr. Pepper, who is one of the directors of this corporation, and who, as his own testimony has shown, to a very large extent dominated the corporation. A course of conduct to profit at the expense of other stockholders, including his own clients, particularly his own clients, in the resale of this corporation.

I have not completed my examination of Mr. Pepper. I really don't know in what ways he did profit other than the $100,000 fee, but this transaction was a transaction which was offered to management and which Mr. Oard has testified was turned down by management.

I am about to ask Mr. Pepper some further questions as to what happened next. But this is only offered for that one purpose, namely, to show a course of conduct.

THE COURT: On that premise I will overrule the objection and admit it.

(Copy of letter dated October 2, 1967, on the letterhead of DeWitt, Pepper & Howell, was received in evidence and marked Plaintiff's Exhibit No. 16.)

BY MR. CARPENTER:

Q Mr. Pepper, you have already testified that there had been a management offer for the purpose of acquiring the stock in this corporation earlier, that is, prior to October of 1967. Is that correct?

A Yes.

Q At what price had they offered to acquire the stock?

A Here is the document that they handed to Mrs. Arlinghaus. The price is $3 down, $14 of debt payable commencing the 6th through the 10th years, in equal installments, plus some stock of a new corporation, and everything subordinated to bank and trade credit.

Q Were you proposing that you acquire your stock in October of 1967 after that offer, at $3 down and $7 by promissory notes?

A Yes.

Q I think you testified that this transaction never went through, this particular transaction evidenced by this letter?

A Management wanted it this year.

Q Well, the one in October of 1967, did that go through?

A No.

Q Did you ever acquire any stock, or any interest in stock, in Modern Talking Pictures?

A No.

Q As a result of this transaction I think you have testified that you will be paid $100,000, which is part of the sum to be deducted from the proposed purchase price?

A Yes.

Q What, if any, other benefits will you get as a result of this transaction?

A Nothing has been offered to me.

Q Have you obtained anything?

A No.

Q Is any payment being made to you on behalf of Sonderling?

A In this deal?

Q Yes.

A No.

Q Is any payment being made to you on behalf of Sonderling in any other connection?

A I am being continued as attorney for Teleservice.

Q Would you continue as attorney for whatever form Modern Talking Pictures takes in the event this transaction went through?

A I have a contract with the old company for one year from somewhere in April, and that contract would be binding on Sonderling if they bought the assets.

Q Has Mr. Sonderling, or any representative of his, indicated any other commitment to you?

A No.

Q With respect to Modern Talking Pictures?

A Absolutely no.

Q What if any connection do you have with the corporation which is to receive the $300,000 and then pay over $100,000 of it to you?

A None.

Q Why is it that the money is being paid to that corporation and then being paid back to you rather than being paid to Modern Talking Pictures and paid back to you?

A It has something to do with accounting, something in connection with pooling of interests.

Q With whose accounting?

A The purchaser's accounting.

Q With Sonderling's accounting?

A Correct.

Q Was the transaction with respect to the finder's fee any part of your deal with Sonderling insofar as this finder's fee is concerned?

A I don't understand the question.

Q I gather from what you say that the reason this money is being paid to the Philadelphia corporation and then paid to you is because of some requirement of Sonderling's, is that correct?

A As I understand it, that's the way the accountants want to handle it.

Q Sonderling's accountant?

A Right.

Q So this is their requirement, Sonderling's requirement?

A To the best of my knowledge.

Q Who in the Sonderling organization told you this was their requirement?

A Mr. Leskowitz, of Leidesdorf.

Q When did he tell you that?

A I don't remember the exact date.

Q Roughly.

A As I understand it, this item has to be capitalized as part of the purchase price.

Q But that would be true whether it would be paid to Modern Talking Pictures or to the firm in Philadelphia, would it not?

A I don't understand your "paid to Modern Talking

Pictures Service." It is being paid to Modern Talking Pictures Service and then Modern Talking Pictures Service is paying these people $300,000.

Q I see. And it is your testimony --

A It comes as part of the purchase price.

Q And it is your testimony that this is a requirement imposed by Mr. Sonderling or his organization?

A That is my understanding of the way they want it done, or the way the brokers want it done. I don't know.

Q Would you identify again the accountant who told you that this was a requirement from Sonderling's standpoint?

A To the best of my recollection, Mr Leskowitz, Bert Leskowitz, I think it is of Leidesdorf.

Q Could you spell that Leidesdorf?

A L-e-i-d-e-s-d-o-r-f.

Q Do you know whether or not Mr. Sonderling or Mr. Becker, his attorney, know anything whatsoever about this proposal?

A Oh, they are familiar with it.

Q The way in which the finder's fee is required to be handled by their organization?

A Yes.

Q Is it correct, Mr. Pepper, that you have been paid a retainer by the corporation at the rate of $1,000 a month

for the past few years?

A Yes.

Q Mr. Pepper, you testified that you saw Mr. Sonderling's letter of March 20, was it the next day, when another recipient of the letter showed you his copy?

A March 22. Not another recipient; Mr. Weil handed me a copy of it.

Q Was that the first you had heard of it, or did you already know your office had received it?

A It was the first I had heard of it.

Q When did you bring that to the attention of the board of directors?

A The letter?

Q Yes.

A At no time.

Q It is addressed to the board of directors, is it not?

A Yes.

Q Why is it that you never delivered or brought to the attention of the board of directors a letter addressed to them by Mr. Sonderling?

A I didn't regard it as my duty. It was not an offer that was acceptable in any way.

Q You were the attorney for the corporation were you not?

A Yes.

Q And you did not regard it as your duty as attorney for the corporation to deliver correspondence addressed to the board of directors, to the board of directors?

A Right. I thought it was inadvisable to do it.

Q Did you ever discuss it with any of the directors prior to or on April 8, 1968?

A Yes, with Mrs. Arlinghaus and Mr. Eberle.

Q Your two clients?

A Yes. They were directors.

Q Did you discuss it with the directors who were not your clients?

A I am not too sure about Mr. Cox, but Mr. Lange I didn't see.

Q Now, Mr. Cox appears on your letterhead, does he not?

A Yes.

Q Is he in your office?

A Yes.

Q You sent a letter of reply, if not of acceptance, on behalf of Mrs. Arlinghaus, to Mr. Sonderling, dated March 22, did you not, the letter that has been introduced into evidence?

A Yes.

Q Did you tell any of the directors about that on or

before April 8, 1968, when the board meeting took place?

A Only those who were my clients.

Q Namely, Mr. Eberle and Mrs. Arlinghaus?

A Yes. The letter purported to be on their behalf.

Q In response to a question by Mr. Anderson, you spoke of the difficulty in getting warranties in connection with the Modern Talking Pictures transaction, and stated that no stockholders in the Teleservice transaction were asked to give any warranties.

A That isn't so.

Q That's exactly what I wanted to bring out.

A I stated that Mr. Ritenour and Mr. Lipsky did make representations and warranties but the other stockholders did not.

Q They were 30% owners, were they not?

A Slightly more.

Q And they were making about $1,200,000 on this transaction?

A I didn't do the arithmetic.

Q Well, they paid $10 for stock they were selling around $60, had they not?

A Based on current market values, that stock is $84.

Q Around $70, then. But in any event, they were making substantial profit?

A As of the date of the closing, no.

Q They were making substantial profit on this transaction?

A I don't know what you mean by "profit." As a lawyer, there is no profit until a transaction is liquidated.

Q I mean the difference.

A They had a paper profit, if that's what you mean.

Q What was the amount of that?

A I don't know.

Q You mentioned a Mr. Weil, who was one of the representatives of a finder's organization. Did you deal with him in connection with the Sonderling transaction?

A I dealt with Mr. Harry Shapiro.

Q Did Mr. Shapiro deal with Weil?

A To the best of my knowledge, yes.

Q And that was on behalf of Sonderling?

A Well, Mr. Weil purported to represent Sonderling.

Q You just heard testimony that his company is getting a finder's fee here?

A I may not have been attentive. I wouldn't doubt that he got a fee. I assume he doesn't work for nothing.

Q You have also had dealings with Mr. Weil, have you not?

A Only in Teleservice.

Q Have you had any dealings with Mr. Weil in respect to the acquisition of Modern Talking Pictures Service?

A No.

Q Have you had any conversations with him in which he purported to express an interest in the acquisition on behalf of a client of Modern Talking Pictures?

A I don't know what you have in mind.

Q Does the name Wometco mean anything to you?

A Yes.

Q Now tell us what your dealings with Mr. Weil have been with respect to the Wometco Corporation.

A Mr. Shapiro arranged for me to meet Richard Wolfson, executiv vice president of Wometco, last fall. I brought him up to meet Mr. Oard. He expressed an interest in buying Modern Talking Pictures Service. He didn't follow up. I think management persuaded Mrs. Arlinghaus to terminate the negotiations.

To the best of my recollection, Mr. Lenz said the deal was to be terminated. In any event, he didn't get a friendly reception, as he reported it to me.

Q Is that all, or have you had further dealings with Mr. Weil since April 8 with respect to the Wometco transaction?

A I haven't, to the best of my recollection. I have talked to Mr. Wolfson. Fuqua asked me to see if I could

arrange for them to buy Wometco, and when I was in Florida I asked Mr. Wolfson if he was interested in selling out to Fuqua. He said he would have it the other way.

Q My question to you, however, is have you had any conversations or dealings with Mr. Weil with respect to a possible acquisition of Modern Talking Pictures by Wometco since April 8?

A Mr. Weil this morning said that Wometco had been interested. I don't know on what basis.

Q And what was your response?

A Nothing.

Q You made no response to him?

A Correct.

MR. CARPENTER: Excuse me, your Honor.

(Pause.)

MR. CARPENTER: I have no further questions, your Honor.

MR. ANDERSON: Just one question that I would like to clear up:

R E D I R E C T E X A M I N A T I O N

BY MR. ANDERSON:

Q Mr. Carpenter asked you if Mr. Cox was in your office, and you said yes and dropped the matter there.

What is the relationship of Mr. Cox to your office?

A Mr. Cox used to be employed by our firm back around 1929-1931, and then he remained as a tenant of ours.

Q Is he associated with you in any way in the practice of law?

A He doesn't participate in my fees.

Q Does he work for you on a salary basis?

A No.

Q Does he pay a rent for his office space?

A He pays me rent.

MR. ANDERSON: That's all.

R E C R O S S E X A M I N A T I O N

BY MR. CARPENTER:

Q Does he appear on your letterhead as an associate

of yours, Mr.Pepper?

A Yes.

Q Do you have any comment to explain why it is he appears on your letterhead as an associate if he is neither employed by you nor --

A When Mr. DeWitt, my senior partner, passed away, there had been some comment that I didn't have any backstops. Mr. Howell is down in Washington. With Mr. Cox's permission, I put his name on my letterhead so that I could tell people if they asked me whether I had any backstops that I had Mr. Cox.

Q And he is your backstop?

A If the occasion requires, he will be my backstop.

MR. CARPENTER: Thank you.

THE COURT: Have you anything else, Mr. Anderson?

MR. ANDERSON: That's all I have of this witness.

THE COURT: Mr. Pepper, I have a few questions:

BY THE COURT:

Q I understand that you never gave to Mr. Unger the price of $2,500,000 as the price for which the corporation could be bought. Is that right?

A I never quoted him any price.

Q Why not? Was there any reason why?

A He wanted a credit deal. He wanted a deal to take

place after June 30. The fiscal year reports were made available by the auditors, and I -- feeling that the company's earnings were going to decline under the management policies, I didn't want to wait that long.

Q In considering Mr. Unger's interest in acquiring the company, in your thinking about this did you identify him with the management of the company?

A Initially I did not. He let slip that he had promised management one-third of the company on credit.

Q And thereafter, in your thinking about Mr. Unger, I take it that you identified him and his interest in acquisition with the management of this company. Is that right?

A Yes.

Q By "this company," I mean Modern Talking Pictures Service, Inc.

A Right.

Q Do you want to tell me if identifying him with management in any way influenced or colored your thinking about Mr. Unger and the possible acquisition by his group?

A Well, Mr. Unger appeared to be a lawyer who was politically ambitious. He stated that he was the Man Friday or right hand man of Mr. Nixon and in the event of Mr. Nixon's election to the presidency, he would be in a position to

procure a substantial amount of business for the corporation.

Q Did you understand my question?

A I'm sorry. Maybe I didn't.

Q I probably put it to you pretty badly, but let me try again:

After you learned of Mr. Unger's intention involving the management of this corporation, to give management of this corporation an opportunity to participate in its ownership, after you learned that, did that fact that you now knew in any way color or influence your judgment as to whether or not it was desirable to continue negotiating with Unger?

A The thing that deterred me was the lack of cash in his office.

Q I take it the answer to my question is no.

A Right.

Q You weren't prejudiced against him because he was identified with management?

A No.

Q I don't want to belabor this, but I'm anxious to be clear on one point:

In response to Mr. Anderson's questions, I think, on direct examination -- I think he explained the reason, or at least attempted to explain the reason why the sale to you and perhaps others at $10 a share was in some way or other

beneficial to the people who were selling.

A That's Teleservice, or are you talking about Talking Pictures?

Q Well, I'm not interested really in the Teleservice part of it. I haven't read this exhibit yet, this Exhibit 16. But is there anything that you want to tell me as to why it would be beneficial to the corporation or the stockholders to sell at $10?

A Yes, I'll be glad to tell you.

Management indicated that they would desert us and leave us, in Mr. Lenz's words, as a company with film winders and not executives. This is a service company.

Q Just one final area of inquiry. You have already been through this with counsel, but let me see if I understand your testimony:

I'm looking at Plaintiff's Exhibit No. 1, which is this letter of March 20 by Mr. Sonderling to Modern Talking Pictures. I'm looking at Plaintiff's Exhibit No. 8, which is your letter of March 22 back to Mr. Sonderling. Do you have those two letters generally in mind?

A Yes, sir.

Q Now, the first one which came from Mr. Sonderling states, among other things, "We submit herewith a firm bid subject to the following qualifications, to acquire all of the outstanding stock of Modern Talking Pictures Service, Inc.,

its subsidiaries, if any, and/or all of its assets for 2.8 million dollars cash."

That letter was addressed to the board of directors of the corporation. Now, as I understand it, that letter came to your attention. Is that right?

A Yes, sir.

Q And you became aware of it?

A Yes, sir.

Q You knew about it?

A Yes.

Q And then you undertook to respond to that letter?

A Right.

Q But when you did that, you responded on behalf, as I understand what you are telling me, of two clients of yours.

A Right.

Q Two clients of yours who held collectively more than half the stock of the corporation, right?

A Approximately 70%.

Q Right. At least before you answered the letter and before the meeting of April 8, you didn't advise the board of directors of the corporation that you received this letter or that you had responded, is that correct?

A That is correct.

Q Were you aware that the letter included the language

that I have just read; that is, that the offer had been made to buy the stock and/or all of its assets?

A Yes.

Q And of course the corporation owned the assets.

A Yes.

Q Not the stockholders.

A Yes.

THE COURT: Do counsel have any further questions?

MR. CARPENTER: Just one question, your Honor, to clear up a point that Mr. Pepper made there:

BY MR. CARPENTER:

Q In talking about the proposal that you and certain of the management of Modern Talking Pictures acquire 40% of the stock at $10 a share, you said this proposal was being made because management said they would otherwise quit and leave the corporation with nothing but film winders. Did the management say they would otherwise quit unless you got 10% of the stock?

A I don't recall any such statement, but probably not. They weren't concerned about me.

Q Who was concerned about you and --

A Only I and my clients.

Q Who had initiated the proposal that you get 10%?

A I discussed that with my clients before. It had

worked successfully in the other company.

MR. CARPENTER: I have no further questions.

THE COURT: Mr. Anderson?

MR. ANDERSON: That's all.

THE COURT: All right. You may step down, Mr. Pepper.

(Witness excused.)

MR. ANDERSON: Mr. Cox, please.

EDMUND H. COX, having been first duly sworn, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. ANDERSON:

Q Mr. Cox, how long have you been practicing law?

A Since 1926.

Q And you are a member of the Bar of the State of New York?

A Of the State of New York.

Q And would you confirm or tell us if there is any difference in the testimony as to what your relationship is with Mr. Pepper?

A During the period from 1926 to 1930, I was employed by Mr. DeWitt. In 1930 I started practicing law by myself. At that time I moved to West Chester County from New York City,

and a substantial portion of the practice I was building up came in West Chester County. On the other hand, I had a very friendly relationship with both Mr. DeWitt and Mr. Pepper who was in his office, and frankly, I don't recall at what time the partnership of DeWitt and Pepper was started, and I needed a connection in New York City; I mean, some place to continue in New York City, so I made arrangements with Mr. DeWitt to rent office space from him in the office.

As I say, it was a very pleasant association with Mr. DeWitt that continued until his death and has continued since that time.

Q Is your relationship solely that of a tenant?

A Just as a tenant and, I hope, a friend of the two people with whom I started so many years ago.

Q And now, when did you go on the board of Modern Talking Pictures Service, Inc.?

A I understand it was in January, 1968. I didn't attend any meeting, however, until March 22, 1968, and the April 8th meeting of 1968.

Q And who approached you about going on the board?

A Mr. Pepper on behalf of Mrs. Arlinghaus.

Q Were you acquainted with Mrs. Arlinghaus?

A Oh, yes. I was acquainted with Mrs. Arlinghaus since about 1927.

Q Why did they ask you, Mr.Cox? What is your background in this particular business?

A This particular business? None, to be very frank. I have been associated doing legal work for a motion picture company, if that's what -- I have clients that are in allied fields in the arts. But in this particular company, none.

Q Why did they ask you to go on the board of directors?

A I assume as a nominee of Mrs. Arlinghaus.

Q I want to ask you one further question:

I'm going to show you Plaintiff's Exhibit No. 1 and ask you if you have ever seen this before?

A I have seen this before.

Q When did you first see it?

A It was sometime after the meeting of March -- probably around the time of the meeting of April 8th.

Q Do you know whether or not in fact you saw it before the April 8th meeting?

A If I did, it was the morning of the meeting.

Q If you had seen that before the meeting of April 8th, in view of the fact that it was addressed to the board of directors, would you as an attorney have felt any obligation to disclose it to the other directors?

A May I say this: I sat there very patiently waiting for disclosure of other offers for assets of this corporation.

Mr. Lenz was there and Mr. Oard was there. Neither Mr. Lenz nor Mr. Oard revealed that they had any negotiations with anyone at that meeting. They said nothing.

MR. CARPENTER: Would you read the pending question back to him, please?

(Question read.)

A Frankly, I feel that the statement made that there had been an offer of $2,800,000 cash for the assets of the corporation which was made at that meeting was pretty much of a disclosure.

MR. CARPENTER: I'm going to get the question read to you one more time before I ask the Chancellor to direct you to answer it.

Would you read the pending question back to the witness, please?

(The pending question was read by the reporter.)

A I believe in communicating anything to the directors, yes, if you want my honest opinion.

BY MR. CARPENTER:

Q Does that refresh your recollection as to whether or not you in fact saw it before the April 8th meeting?

A I didn't see the letter, but as I say, there was a disclosure of the contents of the letter early in the meeting.

Q Did you not see the letter before the meeting of

April 8th?

A Probably not; probably not until later that day.

MR. CARPENTER: Thank you very much. I have nothing further.

MR. ANDERSON: That's all.

Do you have any questions, your Honor?

THE COURT: No. You may step down, Mr. Cox.

(Witness excused.)

MR. ANDERSON: The defendant rests, your Honor.

MR. CARPENTER: Your Honor, I have two very quick rebuttal witnesses. I'm going to ask one of them one question in one area and the other one three questions.

Mr. Sonderling, will you take the stand, please?

MR. BECKER: This is a rebuttal witness?

MR. CARPENTER: Yes.

You are already sworn, Mr. Sonderling. You don't have to be sworn again.

MR. ANDERSON: Are you calling him as an adverse witness?

MR. CARPENTER: Yes.

EGMONT SONDERLING, having been previously duly sworn, was recalled as an adverse witness by the plaintiff and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CARPENTER:

Q Mr. Sonderling, did your corporation insist that the $300,000 finder's fee be paid to Commonwealth Development Corporation, and did it insist that the $100,000 of that which is to go to Mr. Pepper also be paid to Commonwealth Development as part of the $300,000?

A I'll have to give you a qualified answer, if you want an intelligent answer.

Directly, no; indirectly, yes. We did not make any demands. We did not make any statements. However, our accountants, who are one of the best in the country, know as a matter of fact that we would not want to load the company with an expense of $100,000, and it goes without saying that they would suggest that the deal be struck in such a way that the expense would not be a company expense in any form, shape or manner.

Q And did you know that your accountants had made this insistence?

A No, I didn't.

Q Well, are you just speculating now as to why they might have insisted?

A That's right. That's my speculation.

Q You are not testifying at all that they did insist?

A No. But this is my reasoning. If I would have been asked, I would have given them the same answer.

Q Is the truth of the matter that you had not heard before Mr. Pepper testified that there had been any such insistence on behalf of your corporation or your accountants?

A No; that's correct.

MR. CARPENTER: Thank you.

(Witness excused.)

MR. CARPENTER: Mr. Unger, will you take the witness stand, please? You have already been sworn. I remind you that you are still under oath.

SHERMAN UNGER, having been previously duly sworn, was recalled and further testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. CARPENTER:

Q Did you in any of your conversations with Mr. Pepper or with any other representative of Modern Talking Pictures advise him or them that you did not want to consummate this transaction between June 30th or some date thereabouts?

A No, sir, Mr. Carpenter. I told Mr. Pepper and everybody else that we were anxious to acquire it as soon as possible, and let me explain one of the reasons why:

If we were in fact to allow management to acquire some stock -- The fiscal year ends on June 30th. There is at least a moral commitment for that company to meet its 30% profit sharing obligation in the fiscal year ended June 30th. We would have, if we were to acquire it before June 30th, funded that obligation with common stock. This would have in effect made equity available to all the employees that were members of that profit sharing plan.

The contrary is so. We were quite anxious to acquire it as soon as possible.

Q It was to your advantage to consummate the transaction well in advance of June 30th?

A It would improve the cash flow by roughly $175,000 and meet our commitment to management.

Now, I didn't slip -- I'm sorry.

Q My second question is this: Did you advise Mr. Pepper at any time that you did not have the cash available for this transaction and that you required a credit transaction?

A Quite the contrary. I had the cash available from late January. I still have the cash available. There is no problem on arranging cash financing.

Q And finally, did you advise Mr. Pepper at any time that you had or would have political pull which could benefit the corporation later on?

A No. He chided me at lunch about my association with the former Vice President, and I said that I was still supporting him but at the moment I wasn't doing much for him. I had just withdrawn as a possible contender for the United States Senate nomination in Ohio, and he chided me a little bit about my political interests and activities.

MR. CARPENTER: No further questions.

C R O S S - E X A M I N A T I O N

BY MR. ANDERSON:

Q I notice, Mr. Unger, in this letter of February 22, 1968, Plaintiff's Exhibit 9, to Mr. Lenz you stated:

"We feel we have the capacity to go forward in cash. However, there are certain definitive advantages to Mrs. Arlinghaus and others if we can arrange a tax free exchange of common for preferred with a guaranteed stock dividend."

You weren't quite so sure on February 22nd that you had the cash to go forward, were you?

A On the contrary, I was quite sure.

Q Well, you didn't express it in this letter.

understand it from the evidence, the board was not asked to act upon the offer at least in terms of the letter which had been addressed to the board by Mr. Sonderling. I do understand that Mr. Pepper communicated certain of the information which was contained in that letter to the board, specifically the purchase price of $2,800,000.

Now, when the board acted, I do note that Mrs. Arlinghaus as a stockholder had already committed herself by signing Mr. Pepper's letter of March 22nd, and at the time of the board meeting on April 8th, she had or was to have next day a signigicant financial interest in the acquiring corporation; that is, Sonderling. Mr. Eberle appears to have been in the same position, and Mr. Pepper also had some interest in it through representation of one of the corporations which it had recently acquired and perhaps in other ways.

The fifth point which I desire to note is that as I understand it, Mr. Pepper said that he did not in any way or at any time state the $2,500,000 or the $2,800,000 price to Mr. Unger, and as far as I can determine, the evidence is undisputed that Mr. Unger on behalf of certain people had recently -- that is, recently in terms of the March 20th and March 22nd letters -- had recently expressed an interest in acquiring the stock and/or assets of this corporation. And about the March 20th or the 22nd date, it seems to me, as I

recall the testimony, that it's undisputed that at least by that date or by those dates his interest had not evaporated.

Now I turn finally to the last and in a way -- I won't say most significant, but certainly one of the significant aspects of the evidence which has persuaded me that I should grant the preliminary injunction, and this concerns the resolution which the board by majority vote adopted on April 8 and which, as I understand it from the evidence, is the substantive basis on which the corporation here proposes to proceed in consummating an agreement with Sonderling. I recognize that there are two somewhat different versions of that resolution which have been offered into evidence.

I do not want at this time to characterize the resolution or to indicate that it is filled with loopholes. Mr. Carpenter has argued that, but at this point at least, I'm not persuaded to adopt his characterization. But I do note that there are some uncertainties, at least uncertainties as to what the final purchase price would be.

Now, the resolution begins with an authorization of sale by the corporation to Sonderling Broadcasting. In the form which was offered by the plaintiff; that is, the form which was drafted by Mr. Vickers which is Plaintiff's Exhibit No. 2, the language is, "With the approval of

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

(By Frankel, D. J.
dated August 6, 1975)

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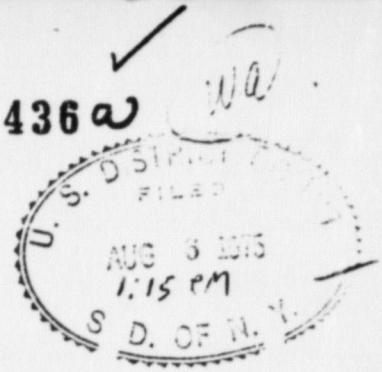

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff,

-against-

SIDNEY PEPPER, et al.,

Defendants.

68 Civ. 4570

FINDINGS OF FACT AND CONCLUSIONS OF LAW

#42926

FRANKEL, D.J.

This statutory interpleader action brought under 28 U.S.C. §1335 concerns a dispute over legal fees and other controversies between a number of former shareholders in Modern Talking Picture Service, Inc. (MTPS), and a former director and counsel to MTPS, Sidney Pepper (Pepper). The crux of the lawsuit is the validity of a settlement agreement signed by the parties on June 7, 1968, in which (1) Pepper released an attorney's retaining lien which he had asserted on the corporate records and on the stock certificates of two shareholders, (2) the shareholders agreed to pay Pepper $75,000 in settlement of his disputed claim to legal fees, and (3) the parties exchanged mutual releases. The shareholders ("cross-claimants" herein) repudiated and rescinded the agreement a few days after it was signed, alleging that it was signed under duress. Pepper has cross-claimed

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to enforce the agreement.

Summary judgment was granted to Pepper by this court in 1970, but that decision was reversed by the Court of Appeals and the case remanded for trial. First Nat'l Bank v. Pepper, 454 F.2d 626 (2d Cir. 1972). A trial having been conducted, the following are the court's findings of fact and conclusions of law.

FINDINGS OF FACT

1. MTPS was at all pertinent times a small, closely held corporation whose original president and principal stockholder was Frank H. Arlinghaus. Pepper became associated with MTPS soon after its start when the law firm of which he was a member became general counsel to MTPS. When Mr. Arlinghaus died, in 1964, the presidency went to Mr. Carl Lenz, and Arlinghaus's stock passed largely to his estate, the executrix of which was his widow, Mrs. Rosalie M. Arlinghaus. Mrs. Arlinghaus also held a substantial block of stock in her own name.

2. In 1966, Pepper sent a letter to Lenz setting forth the latest in what had been a series of retainer agreements under which Pepper's firm had acted as corporate counsel. The letter said in pertinent part:

"Pursuant to the request at the last directors' meeting we are setting forth our understanding of the retainer of this firm by the corporation.

"The retainer includes all legal services for the corporation of the character and amount heretofore performed which can be performed in the City of New York during customary business hours, but not litigation and special services such as trademark services. No charge shall be made by us for any legal services not covered by the retainer except with your prior approval.

"If the character of the corporation's business should change substantially by reason of the entry into new activities, we shall have the right to ask for a reconsideration of the amount of the retainer.

"We suggest that the retainer be for a calendar year with automatic renewal for consecutive like periods unless either of us shall request a change before October 1st of the current year. For the first year hereunder the amount of the retainer is to be considered and fixed at the next Board of Directors meeting."

3. The heart of this case with respect to the interpleaded moneys is Pepper's claim that he was owed legal fees by MTPS and/or its two largest shareholders, Mrs. Arlinghaus and Mr. Howard Eberle. (The usually dubious "and/or" in the preceding sentence reflects the steady ambiguity proffered by Pepper himself on this subject. Lacking, as will appear, any valid claim for any fees from anyone, he steadily characterized the claim, at the time of the events and in his testimony here, as being against either the corporation or the shareholders or both, asserting finally that somebody had to pay him and he cared not

who.) It was because of these unpaid fees, he asserted, that he withheld the Arlinghaus and Eberle stock, for the release of which the shareholders of MTPS (all except Eberle) made the agreement of June 7, 1968, under which he demands the interpleaded fund. Upon all the evidence, however, it has become clear that the claim for fees lacked a foundation. As against MTPS, the alleged basis of the claim was services in considering prospective purchasers of the corporation's stock or assets.[1] But these services, wildly and vaguely inflated in Pepper's evidence, were neither extensive nor specially vital nor notably skilled. What is more critical, they represented nothing beyond what MTPS was entitled to for the $1,000 per month under the retainer agreement. If this could be doubted, Pepper confronts the equally decisive, and undisputed, obstacle that neither these services nor any others upon which Pepper's claim might rest were ever the subject of MTPS president's "prior approval" as required for added charges "for any legal services not covered by the retainer. . . ."

4. The record is equally fatal to Pepper's position insofar as he would count upon asserted legal fees due from either Mrs. Arlinghaus or Mr. Eberle. Neither of these (any more than any other shareholder) had authorized Pepper to perform compensable services in

connection with possible shares of their stock. While such potential sales might benefit them, his work as paid retained counsel for the close corporation embraced that without further obligations from them to him. In addition, for personal work for Mrs. Arlinghaus or her husband's estate, Pepper was paid separately and was not owed anything (nor does he seriously assert otherwise) justifying the claimed lien which is central in this case. Comparable, though even less important, findings are made for Eberle. Pepper did occasionally do some small legal services for this second largest shareholder as incidents of his long years of mutually profitable association. He sent Eberle no bills. There was no understanding that Eberle owed him anything. There was not a semblance of any such obligation at the time Pepper was claiming his lien.

5. The key events in this case took place between March and June, 1968. Negotiations had been going on for the sale of Modern Teleservice, Inc., a sister company of MTPS, with Fuqua Industries, Inc., but they broke down in March. A new buyer, Sonderling Broadcasting, Inc., was brought onto the scene through the efforts of Harris Shapiro of Commonwealth Corporate Development Corp. and Steven Weil of Corporate Developers, Inc. Sonderling's stock for stock purchase was closed on April 8, 1968. In the preceding year Pepper had persuaded the

shareholders of Modern Teleservice to sell 40% of their stock to him and two top managers, as a result of which Pepper ended up with 10% of Modern Teleservice.[2] The major stockholder in Teleservice was the Arlinghaus estate, whose attorney was Pepper. After the Sonderling purchase, the former Teleservice shareholders, Pepper, Mrs. Arlinghaus, and many of the MTPS shareholders, became shareholders in Sonderling.

6. In the fall of 1967, Pepper made a proposal to the MTPS management that they participate with him in a scheme similar to the one used in the sale of Modern Teleservice by which Pepper and the key management would acquire an interest in MTPS in anticipation of its sale. Management rebuffed the proposal. Anticipating the sale of MTPS in one fashion or another, Pepper was motivated strongly in his subsequent actions by an interest in seeking a profit for himself from any such transaction. When in March 1968 Sonderling made known, through Shapiro and Weil, its interest in acquiring MTPS as well as Modern Teleservice, Pepper was attracted to the idea because it was brought to him by business brokers with whom he had had previous dealings and because he knew Sonderling favorably from the impending Teleservice deal.

An offer to buy either the assets or the stock was made by Sonderling in a letter addressed to the MTPS Board

dated March 20, 1968. A letter to Pepper from Shapiro dated March 21, 1968, reveals that the two had an "understanding" that Shapiro's firm would receive a "fee or commission" from the MTPS shareholders for the Sonderling deal. The fee would be whatever amount over $2,500,000 Sonderling paid for MTPS, and would be split equally between Shapiro and Pepper, with a maximum, however, of $100,000 for Pepper.

7. The March 20, 1968, Sonderling letter was delivered to Pepper by Weil, who, Pepper claims, represented that he would deliver a copy to an MTPS officer the same day. In fact, however, the MTPS board never knew the terms of the offer until a meeting of April 8 (infra) at which it was approved. Just prior to this meeting, Pepper procured from Mrs. Arlinghaus her signature signifying consent to the transaction as outlined in the Shapiro letter of March 21. She gave this signature in reliance on Pepper without actually reading the letter. Four other shareholders wrote similar consents, at least two doing so simply because Mrs. Arlinghaus had.

8. The Sonderling deal was conceived and approved very rapidly in the face of an earnest bid made by another party, Sherman Unger. Unger, a boyhood friend of an MTPS officer and the apparent preference of the MTPS officers as purchaser, made an offer of $21 per share for MTPS at a March 12, 1968, meeting with Pepper. Pepper made a point at this meeting of his interest in a fee of about $100,000 for procuring the sale of MTPS. Unger did not react

favorably. Pepper tried to put Unger off and to prevent meetings between him and Mrs. Arlinghaus.

9. A Board of Directors meeting was held April 8, 1968, at which Pepper formally proposed that MTPS should sell substantially all its assets to Sonderling for $2,800,000, with $300,000 of the purchase price going as a fee to Commonwealth, which would in turn pay Pepper $100,000. This was the first time he had informed most of the directors of the details of the Sonderling deal.

10. The sale to Sonderling was approved by a 4-3 vote, with Pepper abstaining. Also approved as part of the sale was the payment of the fee to Shapiro and Pepper. Pepper has shifted and vacillated in his proposed characterizations of this $100,000 fee. He urges recently that it was for legal services, but not for the same legal services upon which his position in this lawsuit is rested. It is plain, however, that Pepper had rendered no legal services to anyone justifying that sum or anything like it. The money was his share of a finder's fee, to which his right, if any, was deeply doubtful.

Since the deal fell through, this is enough on this subject.

11. The Sonderling asset sale was never consummated because three weeks after the Board's approval, a minority shareholder, Richard M. Hough, brought suit in Delaware to enjoin it. On May 13, 1968, the sale was enjoined. The Chancellor found, inter alia, that Pepper's interest in Sonderling and his failure to keep the Board and Unger informed of the terms of the Sonderling deal were reasons to maintain the status quo while he tried the issue of the fairness of the transaction.

12. On May 21 and again on May 22, Pepper was visited by an officer of MTPS accompanied on the second occasion by Mrs. Arlinghaus and the new counsel for her and MTPS, Mr. William E. Kelly. Pepper was asked to turn over the stock certificates of Mrs. Arlinghaus and Eberle and the corporate books of MTPS which he held. These materials were wanted promptly to consummate a sale of the MTPS stock to Unger. Pepper refused to release them, however, unless, as he said then, he received payment of $100,000 as compensation for the work done in the aborted sale to Sonderling. He also estimated his disbursements at $10,000 (later revised to $15,000 or $16,000). Pepper told Kelly he was uncertain whether the fee was an obligation of MTPS or of the shareholders, but that he "wanted to be paid by somebody." On May 29, the same MTPS officer and an associate in Mr. Kelly's firm returned to Pepper's

office with a bond to serve as substitute security for the stock certificates and corporate records, but Pepper refused to accept the bond.

13. When Pepper refused to accept the bond as security, Mrs. Arlinghaus brought an action in New York Supreme Court to compel Pepper to turn over the stock and papers he held. Pepper's response was a course of delay and obstruction designed (a) to maintain the leverage of his lien at all costs and (b) by the same token, to avoid any procedure that might subject to orderly and impartial scrutiny his claimed right of compensation by "somebody" for alleged legal services.

Thus Pepper avoided personal service, necessitating a second action in which substituted service was permitted but in the meantime causing a delay of a couple of days. At the June 5, 1968, hearing that was finally held, Pepper's counsel objected to the terms of the bond, saying it should be for $115,000 rather than $110,000 and that it should cover liability of all the shareholders as well as MTPS. MTPS's counsel agreed to amend the bond and the court directed Pepper's counsel to report back by 4 P.M. Pepper's counsel, after 5 P.M., hand-delivered to the Judge a letter reporting a new objection - that counsel for the petitioners did not represent Eberle, and that Pepper was still Eberle's counsel and under orders from him to retain the stock. This was a pretext

and a stratagem. In fact, Eberle had authorized the action on his behalf, his later denials of this reflecting crass motives. More importantly, this afterthought question was a straw for Pepper, serving his main purpose of enforcing the baseless "fee" claim in the crisis circumstances as they then appeared both to him and to the shareholders on the other side.

Pepper seeks now to buttress his position retrospectively by claiming in his post-trial brief that the bond would have been useless because he could not have obtained jurisdiction over Mrs. Arlinghaus or Eberle (who were not New York residents) nor over MTPS because it was about to be acquired by Unger's firm and would cease to exist. The argument is that since payment of the bond depended upon "the payment of any final judgment which may be rendered . . . in any action commenced in the Supreme Court of the State of New York, New York County", the bond was worthless if jurisdiction could not be obtained against the principals. But the short answer to Pepper's post hoc problems is that this supposed difficulty was one easily surmounted; the shareholders and their counsel were ready and willing to give a meaningful and effective bond to secure any rights Pepper might have had to legal fees. Pepper carefully blocked any efforts toward negotiating such a bond.

14. Pepper's tactics with the bond were a major factor precipitating the crisis which led to the June 7 settlement agreement central in this case. Unger had made a formal tender offer for the MTPS stock on May 10, three days before the Delaware hearing. It was to expire May 24, which had been the major reason for the activity May 21 and 22 attempting to get Mrs. Arlinghaus's stock from Pepper. Because of Pepper's assertion of the lien, Unger had extended his offer to June 7, 1968.

The stockholders met on June 7 to discuss Unger's offer, Pepper's lien,and the choices facing them. All agreed that Pepper's claims for fees were unfounded. It was also agreed, however, that his retention of the papers on which he was asserting a lien presented a condition of emergency. The judgment was that an alternative asset transaction (though capable of consummation without the papers Pepper held) would be inferior to a stock purchase for a number of reasons. Unger was not willing to extend his offer beyond that day. Pepper had sent word that this was a critical day because he would be leaving almost instantly for an extended stay in Arizona, and perhaps then on an African safari. It was also reported that Pepper was now ready to settle his claims for $75,000.

15. In the shareholders' conversations conducted during that day, the opinion was expressed that Pepper deserved nothing, his threats amounted to coercion and duress, and

any agreement would be the product of duress. There was, however, no fixed or single opinion as to whether a settlement agreement, if reached, should be honored. The concept of duress was one of the ideas swirling in the confused atmosphere of the meetings, like the alternative of an asset purchase. The discussions contained no clear plan, but rather frustration, confusion, indignation, and finally, reluctant acquiescence. There was no single, organized, meeting, but rather a series of meetings with various participants in rooms throughout MTPS's offices.

The conversations and negotiations led the shareholders to conclude that their only course was to settle with Pepper. A settlement agreement was negotiated and prepared by Kelly and Pepper's counsel. Pepper and all the shareholders (except Eberle) executed it on June 7. It provided:

> "1. That heretofore Pepper has claimed approximately $116,000 in legal fees and disbursements against the Stockholders and the Corporation for which he has impressed a lien.
>
> "2. The Stockholders and the corporation have heretofore denied the validity of the said Pepper claim and lein [sic].
>
> "3. There is a proceeding now pending in the Supreme Court, New York County under Index #8982/68 to require the said Pepper to deliver up the said Stock Certificates, books and papers upon which he has claimed a lien and the parties hereto now desire to adjust their differences.

"4. Accordingly, the parties hereto agree that there shall be paid to Pepper, in full satisfaction of all claims for services rendered to the Stockholders and the Corporation, the sum of $75,000. The said sum is to be paid by the Stockholders to Sidney Pepper only pursuant to the executed assignment attached hereto and made a part hereof.

"5. Upon receipt of the said $75,000, Pepper shall have no further claim of any kind or type against any of the Stockholders or the Corporation and the Stockholders on one hand and Pepper on the other hand shall fortwith [sic] exchange general releases, releasing each other, except for any promisory [sic] notes executed by Mariam J. Pepper, John J. Lipsky and any collateral security for said notes and, in addition, Pepper agrees to execute and deliver a general release to Modern Talking Picture Service, Inc.

"6. The Stockholders also warrant and represent that they are executing this agreement and the assignment of the $75,000 of proceeds of their own free will in the presence of each other and Attorney, William E. Kelly, Esq., who is present at the execution of this agreement.

"7. In the event the Sherman Unger Group do not purchase the corporate stock of the Stockholders on or before June 24, 1968, then it is hereby agreed that the Stockholders and the Corporation, individually and jointly shall restore said Pepper to the same position he held prior thereto and shall cause themselves and the Corporation to return the stock and papers which he has this date delivered to them, so as to reinstate his lien.

"8. Pepper agrees to cause Edmund H. Cox to deliver a written resignation as Director of Modern Talking Picture Service, Inc. to said Corporation on or before June 14, 1968."

16. On the next business day after the settlement agreement was signed, Monday, June 12, 1968, the cross-claimants' counsel sent a telegram to the purchasers informing them that cross-claimants had revoked the assignment to Pepper of part of their purchase price proceeds and directing the purchasers to pay the $75,000 fund to the stockholders or to place it in escrow. This lawsuit followed.

17. In the difficult, somewhat frenetic circumstances confronting them on June 7, the cross-claimants soundly and reasonably believed they faced irreparable harm, with no other feasible remedy than to conclude the agreement with Pepper. Pepper himself acted on the same understanding of their situation.

The change to an "assets deal," quickly said, presented problems of recasting and attendant paper work which alone precluded consummation on that day. More significantly, there were severe tax consequences of such a change, including the receipt of ordinary income rather than capital gains by the shareholders. Additionally, assuming Unger might have been willing to change and delay the transaction, it might well have proved impossible because MTPS's assets included a number of contracts incapable of assignment to a different corporation.[3] Though it was not strictly a business concern, a number of MTPS employee-shareholders were

reluctant to use an asset purchase. Such a course would have meant the liquidation of MTPS, with its work being carried on by a different company. After a 30-year association with MTPS, they wanted the company and its name to carry on though the ownership changed.

Pepper suggests that other purchasers were available. The evidence discloses, however, that there were no concrete and definite offers on the scene as favorable as the one in hand from Unger on June 7.

It remains conceivable, of course, with hindsight, that the shareholders might have defied Pepper, continued their lawsuit for as long as it took to defeat his asserted lien, and then come out better financially in the end. But they behaved reasonably as practical people in concluding under pressure that the unknowns in that risky course should be avoided if at all possible. And it bears emphasis that Pepper's calculated judgment was the same as theirs. A bond would have assured his recovery of any fees to which he was rightfully entitled. He preferred to "settle" with clients in extremis - preferring, as he now puts it, not to "give up a valid lien for a questionable lawsuit. . . ."[4]

CONCLUSIONS OF LAW

1. The general rule is that a contract is voidable on grounds of duress of property if one detains another's property under an unfounded claim or in an improper manner and refuses to relinquish the property except upon compliance with an unlawful demand. First Nat'l Bank v. Pepper, supra, 454 F.2d at 633; Hellenic Lines Ltd. v. Louis Dreyfus Corp., 249 F. Supp. 526, 529 (S.D.N.Y. 1966); Oleet v. Pennsylvania Exch. Bank, 285 App. Div. 411, 137 N.Y.S.2d 779 (1st Dep't 1955). It is sometimes said that each case must stand on its own facts, with the court considering such matters as the personal and financial characteristics of the party seeking rescission, the question of good faith and reasonable belief by the party making the demand, the adequacy of consideration passing between the parties, and the existence vel non of a reasonable belief in the party seeking the rescission that no other means of immediate relief, legal or practical, existed when the contract was made. Gallagher Switchboard Corp. v. Heckler Elec. Co., 34 Misc. 2d 256, 229 N.Y.S. 2d 623 (Sup. Ct. Kings Co. 1962); Manno v. Mutual Benefit Health & Acc. Ass'n, 18 Misc.2d 80, 187 N.Y.S.2d 709 (Sup. Ct. Queens Co. 1959); Petcheff v. Christo Petcheff, S.A., 129 N.Y.S.2d 677 (Sup. Ct. Kings Co. 1954), aff'd, 286 App. Div. 1099, 145 N.Y.S. 2d 694 (2d Dep't 1955). Essentially the same test has been formulated by focusing

on the state of mind of the person who seeks avoidance of the contract and asking whether at the time the contract was made there was such severe impairment of bargaining power that it can be said that the person who seeks avoidance was precluded from exercising free will and judgment in the transaction. Austin Instrument, Inc. v. Loral Corp., 35 App. Div. 2d 387, 316 N.Y.S. 2d 528 (1st Dept 1970), modified, 29 N.Y.2d 124, 272 N.E.2d 533, 324 N.Y.S.2d 22 (1971).

The facts of this case lead, on any formulation of the theory, to a conclusion that the June 7, 1968, settlement agreement was the product of duress and therefore voidable by the cross-claimants.

2. Pepper cannot defeat the rescission with his argument that the cross-claimant shareholders had "unclean hands." As has been found, they had no single condition of either heads or hands on June 7. Some, indeed, were resolved to repudiate after signing, as one put it, with a pistol at their heads. Others had no such resolve, or were simply confused or uncertain. But even if all meant on the spot to claim duress promptly thereafter, this could not avail Pepper in reviving his groundless claim for legal fees, which is at the bottom of all this. For the point of duress is that it destroys any claim of the party exerting it that his victim gave "consent." The party coerced is

entitled to know of the rule at the time of his surrender and to plan then to invoke it if possible. See, e.g., Wou v. Galbreath-Ruffin Realty Co., 22 Misc. 2d 463, 195 N.Y.S.2d 886 (Sup. Ct. N.Y. Co. 1959); Mutual Redevelop. Houses, Inc. v. Hanft, 42 Misc. 2d 1044, 249 N.Y.S. 2d 988 (Civ. Ct. N.Y. Co. 1964). Indeed, the often cited rule that a party who signs a contract under duress must rescind as soon as possible after the duress has ended, Joseph F. Egan, Inc. v. City of New York, 18 A.D. 2d 357, 239 N.Y.S. 2d 420 (1st Dep't 1963), suggests that the law finds it appropriate and necessary for a party forced involuntarily to sign a contract to plan his legal remedy at the earliest moment, even at the time of signing.

Assuming the notion of "unclean hands" has any place here, it remains an equitable concept that Pepper is disentitled to employ. A party may advance this defense only if he is less at fault or in pari delicto with his adversary. Furman v. Furman, 178 Misc. 592, 34 N.Y.S.2d 699, 704-05 (Sup. Ct. N.Y. Co. 1941). Pepper's serious breaches of the lawyer's duty of good faith and fair dealing with former clients, culminating in footless demands for huge "legal fees" for no uncompensated services, make his by a wide margin the greater (if not the only) offenses against equity and good conscience in this case.

3. Having found the June 7 agreement null and void, the court will dismiss Pepper's first cross-claim and award recovery to the cross-claimant shareholders on their first cross-claim in amounts totaling $79,750.30.

4. Pepper's second cross-claim, alleging a conspiracy, inter alia, to induce a breach of the Sonderling purchase contract with the malicious purpose of depriving him of the $100,000 to which he was entitled under that agreement, will also be dismissed.

The Sonderling transaction was defeated chiefly, or wholly, by the Delaware Chancery Court injunction issued on May 13. The MTPS shareholders were privileged to employ lawful means to oppose a contract between the business and a third person, Felsen v. Sol Cafe Mfg. Corp., 24 N.Y.2d 682, 687 (1969).

The second part of this cross-claim (an asserted "conspiracy" to repudiate the June 7 agreement) is simply the first cross-claim dressed up in different clothes. The conclusions upholding that repudiation apply here again.

5. Pepper's claim for attorney's fees must, of course, be denied.

6. Cross-claimants make a second cross-claim of their own asking for attorney's fees. In the exercise of discretion, this will also be denied.

7. A third cross-claim is made for judgment in favor of Mrs. Arlinghaus in the amount of $750 with interest. This is an amount claimed to have been paid to Louis Ogust, a New Jersey attorney, by Mrs. Arlinghaus after she had paid a similar amount to Pepper on his representation that he would compensate Ogust for his services. The claim is not proved. It is dismissed.

8. Finally, Mrs. Arlinghaus has brought, as alternatives, a fourth and a fifth cross-claim. The fourth is for enforcement, as a matter of full faith and credit, of a judgment entered against Pepper in the amount of $19,842.19 with interest in the Probate Division of the Monmouth County, New Jersey, Court.

Pepper did not appear personally in the New Jersey action and contests here the jurisdiction of that court. Service on him was by mail and jurisdiction was asserted under the New Jersey long-arm provisions. N.J. Civ. Prac. R. 4:4-4(e). With respect, this court finds the assertion of jurisdiction to have been ineffectual. The cause of action in this claim does not arise out of acts done or transactions consummated in New Jersey. All of Pepper's work, apparently devoted primarily to the federal estate tax, was done in New York. No soliciting was done in New Jersey, no contract entered into in that state, McGee v. International Life Ins. Co., 355 U.S. 220 (1957), no acts committed there by Pepper

that could be characterized as purposeful efforts indicating an intention to avail himself of the privilege of conducting business in that State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945). While probate administration is a subject of special concern and regulation for the states, a condition which in some circumstances justifies exceptional extension of in personam jurisdiction, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627 (1935); McGee v. International Life Ins. Co., supra, 355 U.S. at 223, New Jersey can protect that interest by regulating the disbursement of funds out of the estate, supervising the executor, and scrutinizing payments before they are made. This case is within at least the penumbra of Hanson v. Denckla, 357 U.S. 235, 251-55 (1958), and the limits that case suggests upon the unquestionably long arms of the states.

For her fifth cross-claim, Mrs. Arlinghaus asks that, if we do not give full faith and credit to the New Jersey judgment, the court should find that because of his disloyalty and self-interested conduct as attorney to the estate and his failure to follow prescribed procedures in the New Jersey courts to justify his fee, Pepper forfeited all rights to payment for services and must repay to her as trustee the $19,842.19. There is a substantially total failure of proof on this, and it too will be dismissed.

Indeed, having obtained approval through New Jersey counsel in the New Jersey court of her paying this sum as executrix to Pepper, Mrs. Arlinghaus falls short of grandeur in demanding now to have it back.

In sum, the cross-claimants will recover on their first cross-claim as follows:

Rosalie M. Arlinghaus, Executrix	-	$48,274.89
Rosalie M. Arlinghaus	-	4,129.08
Rosalie M. Arlinghaus Custodian for Frank Arlinghaus, Jr.	-	3,244.28
Rosalie M. Arlinghaus Custodian for John C. Arlinghaus	-	3,244.28
Anna Marie Schlereth	-	10,352.20
Harry W. Bogaards, Jr.	-	5,574.26
Elsie W. Cox	-	707.84
Richard M. Hough	-	589.86
Ralph DelCoro	-	294.94
Bertha A. Broglie	-	94.39
Alix Ann Arlinghaus	-	3,244.28
	Total	$ 79,750.30

All other claims, on both sides, will be dismissed. In the exercise of discretion, the court directs that each side should bear its own costs.

The Clerk of the Court will enter judgment in accordance with the foregoing findings and conclusions.

So ordered.

Dated, New York, New York
August 6, 1975

Marvin E. Frankel
U.S.D.J.

FOOTNOTES:

1. While some offers had been made from time to time to buy MTPS, in 1967 these offers became somewhat more frequent and earnest. The decisive bulk of Pepper's claim for fees is based on work he claimed to have done in connection with these offers for both MTPS and Mrs. Arlinghaus.

   Pepper offered dramatically contradictory testimony as to the amount of time he spent in dealing with these offers, the contradictions involving even the time when he estimates his efforts began. At the trial he testified that his work began in September, 1966, and that from 1966 to 1968 he put in approximately 1000 hours work. But at his deposition, he dated the start of his work at December 20, 1967, when he claims Mrs. Arlinghaus authorized him to commence efforts to sell her interest in MTPS. When confronted with this deposition testimony, Pepper testified that the 1000 hours of work was done from December, 1967, to March, 1968. The physical impossibility of this claimed labor, adding to more than eight hours of billable time seven days a week during those four months, indicates that Pepper was confused.

   The principal documentary evidence offered by Pepper to substantiate his claim for $115,000 in fees and disbursements is contained in Exhibits 23A and FFFF. The former consists almost wholly of annual reports for a couple of prospective buyers, carbon copies of brief letters to corporate suitors of MTPS, and memos to the file on telephone or lunch-time conversations. The latter is a self-serving summary by Pepper of the work he did, made long after the alleged events, a summary that is contradicted by his testimony. For example, he claims in Ex. FFFF to have worked on the injunction action in Delaware to block the sale of MTPS to Sonderling Broadcasting, while at trial he denied that he had consulted with MTPS's counsel in that case or that he was demanding compensation for work in that case.

2. The stock was actually placed in the name of Mrs. Pepper.

3. If an asset purchase had been used, Unger indicated that he would insist on a 40% escrow of the purchase price to cover contingent liabilities, most particularly the important MTPS contracts.

4. Answering Brief 5. When Pepper refers to "a questionable lawsuit", he means one in which, as he contends, "he could not have gotten jurisdiction over the parties." But this, as has been noted, is a makeweight. The shareholders were prepared - and the State Judge was evidently prepared to lead them if necessary - to execute a genuine and effective bond. Believing (as they did) that he had them over the proverbial barrel, Pepper adamantly preferred his lien. The ethical character of such treatment of long-standing clients is a matter of some interest, briefed at the court's instance, but not necessary to explore after all for present purposes.

INTERPLEADER JUDGMENT
Appealed From

462a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff,

-against-

68 CIVIL 4570
(MEF)

SIDNEY PEPPER
ROSALIE M. ARLINGHAUS, EXECUTRIX
ROSALIE M. ARLINGHAUS
ROSALIE M. ARLINGHAUS CUSTODIAN FOR
FRANK ARLINGHAUS, JR.
ROSALIE M. ARLINGHAUS CUSTODIAN FOR
JOHN C. ARLINGHAUS
ANNA MARIE SCHLERETH
HARRY W. BOGAARDS, JR., ELSIE W. COX,
RICHARD M. HOUGH, RALPH DEL CORO,
BERTHA A. BROGLIE, ALIX ANN ARLINGHAUS,

Defendants.

INTERPLEADER JUDGMENT

U.S. DISTRICT COURT
FILED
SEP 4 1975
S.D. OF N.Y.

The issues on cross-claims in the above entitled interpleader action having been brought on regularly for trial before the Honorable Marvin E. Frankel, United States District Judge, on May 19, 20, 21, 22 and June 3, 1975, and at the conclusion of the evidence the Court having reserved decision, and the Court thereafter, on August 6, 1975, having handed down its opinion constituting its findings of fact and conclusions of law, and directing the Clerk to enter judgment in favor of the cross-claimants, it is

ORDERED, ADJUDGED and DECREED that the defendants cross-claimants recover the balance remaining on deposit of the amount heretofore paid by Plaintiff into the Registry of the Court with accumulated interest thereon, aggregating at least the sum of $79,750.30, which said sum the Clerk of the Court shall pay to cross-claimants in the following amounts:

MICROFILM
SEP 24 1975

Rosalie M. Arlinghaus, as Executrix of the Will of Frank H. Arlinghaus	$48,274.89
Rosalie M. Arlinghaus	4,129.08
Rosalie M. Arlinghaus, as Custodian for Frank Arlinghaus, Jr.	3,244.28
Rosalie M. Arlinghaus, as Custodian for John C. Arlinghaus	3,244.28
Anna Marie Schlereth	10,352.20
Harry W. Bogaards, Jr.	5,574.26
Elsie W. Cox	707.84
Richard M. Hough	589.86
Ralph J. Del Coro	294.94
Bertha A. Broglio	94.39
Alix Ann Arlinghaus	3,244.28
TOTAL	$79,750.30

And it is further

ORDERED, ADJUDGED and DECREED: That, in the event a balance remains in the account in this action after payment of the foregoing amounts, the Clerk shall distribute such balance to the above listed cross-claimants in the same proportions in which they share in the sum of $79,750.30, as indicated in the foregoing ordering paragraph;

And it is further

ORDERED, ADJUDGED and DECREED: That all other claims on both sides will be dismissed and the Court directs that each side bear its own costs.

Dated: New York, New York
September 24, 1975

Raymond F. Burghardt
CLERK

18825
002

464a

FILED
DISTRICT COURT
Oct 6 11 33 AM '75
S.D. OF N.Y.
No Fee

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE FIRST NATIONAL BANK OF CINCINNATI, Plaintiff, -against- SIDNEY PEPPER, MODERN TALKING PICTURE SERVICE, INC., et al., Defendants, ELSIE W. COX, BERTHA A. BROGLIE, RALPH J. DEL CORO, HARRY BOGAARDS, JR., RICHARD M. HOUGH, ANNA MARIE SCHLERETH, ALIX ANN ARLINGHAUS AND ROSALIE M. ARLINGHAUS individually; as Executrix of the Will of Frank H. Arlinghaus; and as Custodian for Frank H. Arlinghaus, Jr. and John C. Arlinghaus, Defendants/Cross-Claimants.	68 Civil 4570 (MEF) AMENDED NOTICE OF APPEAL

Notice is hereby given that Sidney Pepper, Defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 24th day of September, 1975.

Dated: New York, New York
October 2, 1975.

BRAUNER BARON ROSENZWEIG & KLIGLER
Attorneys for Defendant
Sidney Pepper
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New York, New York 10005
(212) 732-5535

TO:

CASEY LANE & MITTENDORF
Attorneys for Defendants/
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26 Broadway
New York, New York

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FILED
U.S. DISTRICT COURT
OCT. 21, 1975
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FIRST NATIONAL BANK OF CINCINNATI,

Plaintiff,

-against-

SIDNEY PEPPER,

Defendant,

ROSALIE M. ARLINGHAUS, as Executrix of the Will of Frank H. Arlinghaus, ROSALIE M. ARLINGHAUS, Individually; ROSALIE M. ARLINGHAUS, as Custodian for Frank H. Arlinghaus, Jr., ROSALIE M. ARLINGHAUS, as Custodian for John C. Arlinghaus; ANNA MARIE SCHLERETH; HARRY W. BOGAARDS, JR.; ELSIE W. COX; RICHARD M. HOUGH; RALPH J. DEL CORO; BERTHA A. BROGLIE; ALIX ANN ARLINGHAUS;

Defendants-Cross-Claimants.

AMENDED NOTICE OF CROSS-APPEAL

68 Civ. 4570 MEF

NOTICE IS HEREBY GIVEN that cross-claimant-appellee Rosalie M. Arlinghaus, as executrix of the estate of Frank H. Arlinghaus, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the judgment entered in this action on September 24, 1975 insofar as by said judgment the Court dismissed the fourth cross-claim stated in cross-claimants' Supplemented Amended Answer With Cross-Claims, thereby refusing to enforce the judgment rendered in favor of said cross-claimant-appellee and against defendant-appellant Sidney Pepper by the Probate Division of the Monmouth County Court, New Jersey on August 30, 1971; and that said cross-claimant-appellee cross-appeals from no other part of said judgment of this Court.

Dated: New York, N.Y.
October 20, 1975

CASEY, LANE & MITTENDORF

By William E. Kelly
A Member of the Firm
26 Broadway
New York, New York
(212) 943-3000

Service of three (3) copies of the within
is admitted this 24th day of December 1975

Cosey, Lane & Mott Esqs.

Attorneys for Appellees and Appellee Cross Appellant